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PRESIDENTIAL ADMINISTRATION, THE APPEARANCE OF CORRUPTION, AND THE RULE OF LAW: CAN COURTS REIN IN UNLAWFUL EXECUTIVE ORDERS?

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Many of President Trump's executive orders aimed to "deconstruct" the administrative state by exercising unprecedented control over agency action. While presidents have exercised directive authority over executive agencies for several decades, these recent directives are particularly troubling because many of them direct agencies to act contrary to congressionally mandated procedures designed to ensure that agencies engage in predictable, transparent, and justified decision-making. This phenomenon poses a threat not only to agency rulemaking but also to corresponding rule of law principles—all at a time when public confidence in government officials has steadily declined and more and more Americans perceive their officials as corrupt, untrustworthy, or otherwise unable to serve the public interest. With Congress unmotivated and unable to act, the Judiciary is the only branch left to check such potentially dangerous directives. This Article seeks to show why courts can and should adjudicate challenges to such problematic orders issued by current or future presidents, despite potential standing problems when orders are challenged directly, in order to promote the rule of law and democratic governance.

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I. INTRODUCTION

Imagine the following scenario: Following his campaign promises to decrease environmental regulations in order to promote economic development, the President issues an executive order directing the United States Fish and Wildlife Service (FWS) to decline listing any new endangered or threatened species under the Endangered Species Act (ESA).[1] The President justifies this directive using only new policy preferences—namely, his goal of easing environmental regulations to decrease the compliance costs for land developers, recreational hunters, and any other industries that may be forced to

1. *See* 16 U.S.C.A. § 1533 (West 2018).

take precautions to avoid harming protected species.[2] Soon thereafter, the FWS denies all pending petitions to list new endangered species, ostensibly because of this order.

Numerous plaintiffs immediately challenge the FWS's decision to reject their petitions to list new endangered species.[3] In challenging the agency's decision not to list the species, the plaintiffs rely on the ESA's provision that listing determinations must be made "solely on the basis of the best scientific and commercial data available."[4] By basing the decision not to list the species on the Administration's new policy preferences, the FWS violated this strict requirement, rendering its decision arbitrary and capricious, and therefore, invalid.[5] Although these types of claims have succeeded before, the FWS might still try to justify its decision not to list the species based on factors other than the President's policy preferences. This is a common tactic in other cases where plaintiffs challenge an agency's decision after it apparently acted on an executive order based on policy preferences rather than the scientific or technical factors that Congress has directed the agency to utilize.[6] The ESA specifically makes clear the limited sources that the FWS may use in listing determinations: the best scientific and commercial data available.[7] As such, the plaintiffs may succeed in challenging the agency's decision, at least insofar as it clearly strayed from these directives and into arbitrary and capricious decision-making.

But what if the plaintiffs decided to try challenging the executive order directly, given that it seeks to halt all listing decisions, potentially endangering an array of species and contradicting the ESA's plain text? Typically, efforts

2. The ESA forbids the "taking" of protected species. 16 U.S.C.A. § 1538(a)(1)(B) (West 2018). Prohibited taking can include direct harm to a species, like hunting or trapping, as well as indirect harm, such as destruction to the habitat of protected species. *See* Babbitt v. Sweet Home Chapter Cmtys. for Great Or., 515 U.S. 687, 697–700 (1995); *see also* Sophie Austin, *Trump Rolls Back EPA Rules, But the Agency Is Far from Gone*, POLITIFACT (July 17, 2020), https://www.politifact.com/truth-ometer/promises/trumpometer/promise/1436/dramatically-scale-back-epa [https://perma.cc/4CRE-6UJW] (describing President Trump's campaign promises to decrease environmental regulations). *See generally* 16 U.S.C.A. § 1538 (West 2018).

3. *See* 16 U.S.C.A. § 1533(b)(3)(A) (West 2018) (describing the process for petitioning the FWS to list a species).

4. 16 U.S.C.A. § 1533(b)(1)(A) (West 2018).

5. *See* W. Watersheds Project v. Fish & Wildlife Serv., 535 F. Supp. 2d 1173, 1187 (D. Idaho 2007) (finding a decision not to list a species arbitrary and capricious where an official prevented the FWS from using the "best science" to make its determination in order to reach a "pre-ordained" politically motivated outcome).

6. *See, e.g.*, Pub. Citizen, Inc. v. Trump, 361 F. Supp. 3d 60, 86 (D.D.C. 2019) (the plaintiffs failed to establish causation as a matter of law where defendants could point to "a number of reasons" for delaying the rules at issue).

7. *See* 16 U.S.C.A. § 1533(b)(1)(A) (West 2018).

to directly challenge similar executive orders directing agency behavior have been less than successful.[8] Standing requirements are often the sharpest thorn in these plaintiffs' sides. For one thing, plaintiffs seeking to challenge directive orders often struggle to show a concrete, particularized injury-in-fact.[9] Even if plaintiffs can allege a sufficient injury, they frequently fail to demonstrate that the challenged order actually caused this injury. Typically, agencies carry out the actions provided for in the order, and then they try to justify their actions with reasons other than the questionable executive order itself.[10] Moreover, even where plaintiffs can show that the executive order directly caused their injuries, courts hesitate to issue relief against a President, such as condemning one of his orders, largely because of separation of powers concerns.[11]

As such, executive orders directing unlawful agency action often remain in place. One might ask why this is really an issue—after all, courts can and do order agencies to revisit their decisions to reflect statutorily required factors. In the scenario above, a court could easily direct the FWS to reassess its decision not to list a species and base a revised decision on the "best scientific and commercial data available," as required by law.[12] Yet, such an outcome, which fails to address the illegality of the President's directive, presents troubling implications for our current system of administrative law as well as our democratic society as a whole. As other scholars have noted, allowing presidents to direct agencies to violate laws in order to fulfill new policy goals poses problems for our system's separation and balance of powers.[13] Specifically, the Constitution vests "all legislative" power in Congress and "the executive" power with the President; allowing the President to direct agencies

8. *See Pub. Citizen*, 361 F. Supp. 3d at 90–93 (declining to dismiss the plaintiffs' claims but denying the plaintiffs' motion for summary judgment and denying motions to intervene by two states); *see also* City & Cnty. S.F. v. Whitaker, 357 F. Supp. 3d 931, 953 (N.D. Cal. 2018) (dismissing the plaintiffs' claims); Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1300 (D. Or. 2019) (finding that the plaintiffs lacked standing to bring the action challenging an executive order promoting fossil fuel development).

9. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562–63 (1992).

10. *Pub. Citizen*, 361 F. Supp. 3d at 86.

11. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1674 (1997). Courts have, however, vacated executive orders that explicitly violate statutory delegations of power to the President. *See* League Conservation Voters v. Trump (*League II*), 363 F. Supp. 3d 1013, 1031 (D. Ariz. 2019) (invalidating part of an executive order purporting to revoke withdrawals of land, which was not authorized by the Outer Continental Shelf Leasing Act).

12. 16 U.S.C.A. § 1533(b)(1)(A) (West 2018).

13. *See* Siegel, *supra* note 11, at 1698; *see also* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 2015 (2015).

to disregard or effectively amend existing laws in order to obtain his desired results violates these provisions.[14]

While the President has some discretion in his duty to ensure laws are "faithfully executed," by directing agencies to act contrary to existing laws, he goes far beyond the bounds of discretion and usurps congressional lawmaking authority.[15] Courts may then avoid their constitutional mandate to check this usurpation, justifying these decisions based on current standing requirements.[16]

Of course, some might say this problem is more theoretical than real, particularly where courts can typically direct the offending agency to follow Congress's mandates, regardless of executive directives.[17] Even more cynically, some might say that courts' refusal to invalidate orders matters little where the President can still informally influence agencies to act in certain ways. This argument, however, misses a second, crucial element of the troubling nature of these executive orders. Executive orders, like the one in this hypothetical example, are not just exercises of discretion in enforcing the law but are, in fact, public demonstrations of the President's blatant disregard for law. By ordering administrative agencies to disobey their congressional directives—like using the best scientific and commercial data to make decisions—the President acts not as a coequal branch of government but instead as a figure elevated above the rule of law.[18] As a result of this public disregard for the rule of law and separation of powers, the President and his orders strike at the heart of public confidence in government. What remains of our system of checks and balances if the President can use his official capacity to blatantly contradict Congress and tell those under his purview to do the same—particularly where Congress has acted well within its constitutional authority?

This concern with public perception of government actors taps into the same fear confronted by courts adjudicating cases involving the corruption of government officials. In those cases, a government official typically accepts a financial reward in exchange for some kind of official action (such as voting for or against legislation)[19] or uses his power as a government official in order to extract some sort of property to which he is not lawfully entitled.[20] Although

14. U.S. CONST. art. I, § 1; *id.* art. II, § 1.

15. *See id.* art. II, § 3; Stack, *supra* note 13, at 1995.

16. Siegel, *supra* note 11, at 1694; Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?,* 19 CONST. COMMENT. 63, 75 (2002).

17. Siegel, *supra* note 11, at 1699; *see also* W. Watersheds Project v. Fish & Wildlife Serv., 535 F. Supp. 2d 1173, 1188–89 (D. Idaho 2007) (ordering agency to re-do listing findings and not rely on policy preferences asserted by other Executive Branch officials).

18. *See* Stack, *supra* note 13, at 1987–89.

19. McCormick v. United States, 500 U.S. 257, 273 (1991).

20. *Id.* at 279 (Scalia, J., concurring).

a number of cases have resulted in narrowing interpretations of the illegality of such conduct,[21] courts, scholars, officials, and even the Framers recognized the dangers of the mere appearance of corruption.[22]

The appearance of corruption, and by extension, the flouting of the rule of law by elected officials in general, damages a government's perceived legitimacy. This already appears to be the case in the context of elected officials who benefit from massive corporate expenditures.[23] As a result, Americans are increasingly distrustful of elected officials.[24] This distrust is only heightened when officials publicly disregard existing laws as if above them. Thus, presidential orders that are unconstitutional (or otherwise violate existing law) pose a threat not just to the separation of powers, but to the continued legitimacy of our democracy.

Recognizing the gravity of the situation that has developed around such polemical executive orders, this Article suggests a possible solution that could remedy some of these impending ills. Specifically, it argues that courts can check a President's wayward directives where Congress has failed to do so.[25] Courts can accomplish this checking function through adequate judicial review of executive orders that contravene congressional directives. Yet courts have sometimes failed to do this because of procedural hang-ups—usually standing requirements. To remedy this, this Article suggests that standing requirements should be approached with more flexibility in these cases.

Although some might criticize this suggestion as an untoward relaxation of standing—a constitutional requirement—standing rules are not always applied in perfect uniformity. Indeed, courts have adopted relaxed standing rules to adjudicate various types of claims.[26] Here, such a relaxation may well be legitimate where plaintiffs suffer not only individual injuries, but also where failing to adjudicate these types of claims allows blatant constitutional

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21. *See id.* at 274 (requiring a "quid pro quo" exchange to find a violation of the Hobbs Act rather than merely the appearance of undue influence); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 346–47 (2010) (declaring that bans on excessive independent expenditures by corporations benefitting political candidates violated the First Amendment, despite public interest in preventing the appearance of corruption).

22. *See Citizens United*, 558 U.S. at 450–64 (Stevens, J., concurring in part) (describing the present and past importance of the anticorruption rationale for structuring governmental conduct).

23. *See* Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand & Darren Modzelewski, *The Appearance and the Reality of* Quid Pro Quo *Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 376 (2016) (describing public distrust resulting from perceived corruption).

24. *Id.*

25. *See* Devins & Fisher, *supra* note 16, at 81, 83–85 (describing Congress's failure to check the President on his exercise of power that is rightfully shared with Congress).

26. *See generally* David Sive, *Environmental Standing*, 10 NAT. RESOURCES & ENV'T 49, 49 (1995) (describing the evolution of standing doctrine in environmental law cases).

violations to persist and undermine the rule of law and democratic norms. Moreover, even if plaintiffs ultimately fail to invalidate an arguably unlawful order, the mere fact that a court is able to exercise review of the order helps to restore some balance to our system, hopefully helping to avoid further deterioration of the rule of law and the public's confidence in it.

This Article therefore proceeds in three Parts. Part II begins by describing the past and present of presidential administration before going on to analyze ongoing challenges to executive orders that seek to undermine congressional directives to agencies. Part III then highlights the major issue presented by these orders: an undermining of democratic norms and the rule of law that threatens the continued legitimacy of our governmental system through the appearance of corruption in the Executive Branch. Finally, Part IV describes a potential solution to this growing problem—namely, relaxed application of standing requirements—which courts already utilize in some areas. In conclusion, under the current system of administrative law, courts can—and perhaps must—play a part in correcting presidential directives that contravene law and the Constitution.

II. PRESIDENTIAL (MIS)ADMINISTRATION: CONTRADICTING CONGRESS THROUGH EXECUTIVE ORDERS

This Part illustrates the ongoing problem of executive orders that undermine existing law. It begins by laying out the legal backdrop of this problem, namely, the history of presidential administration of executive agencies.

This practice has evolved from seeking to prevent over-regulation, to directing agencies to implement specific regulations within their alleged purview, and to now carrying out an agenda that is not merely deregulatory but that essentially enacts a post hoc veto of decades–old legislation to further new policy goals.[27] Next, this Part highlights a few recent executive orders and the legal challenges they have faced; notably, plaintiffs have faced great difficulty in meeting the jurisdictional requirement of standing.[28] This Part concludes that these executive orders expose a loophole in current administrative law, one that endangers rule of law principles.

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27. *Compare* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (directing agencies to designate two regulations for repeal for each new regulation proposed and to choose to eliminate regulations based solely on social costs), *with* 42 U.S.C.A. § 7409 (West 2012) (directing the EPA to set air quality standards based on public health), *and* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468–71 (2001) (holding that the Clean Air Act prohibits the EPA from considering costs when setting national air quality standards).

28. *See infra* Part II.B; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).

A. Presidential Administration of Executive Agencies

i. Theoretical Origins and Concerns

To understand the current climate of presidential administration of agencies, it is helpful to briefly explore the history of this type of executive action. The administrative state has not always existed in the form it does now; it expanded drastically before and during the New Deal era, and from there, continued to flourish into the 1960s and 1970s.[29] Meanwhile, Congress passed statutes creating administrative agencies to deal with a variety of specialized problems.[30] Agencies composed of individuals with specialized expertise were thought to be better able to promulgate and enforce rules dealing with precise and complex situations.[31] As such, these agencies operated under broad grants of authority from Congress, allowing them to make and enforce issue-specific rules as needed.

At the beginning of the administrative boom in the 1930s, it was unclear to what extent the President—as opposed to Congress—had control over administrative agencies.[32] Although created by Congress, administrative agencies are part of the Executive Branch pursuant to Article II of the United States Constitution.[33] Article II provides that the President may appoint "Officers of the United States" with the advice and consent of the Senate, and those officers' positions would be established "by [l]aw" (as in, by Congress).[34] Aside from creating the officer positions, Congress retained the power to set the hiring procedures for "inferior [o]fficers."[35] These Article II provisions, alongside Congress's enumerated powers under Article I, Section 8, have formed the general basis for Congress's creation of administrative agencies, as analogs to the departments and officers mentioned by the Constitution.[36]

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29. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001).

30. *Id.* at 2253.

31. *Id.*

32. *See id.* at 2275 (describing that although agencies were ostensibly among the president's responsibilities, he did not appear to have a way to control or supervise them).

33. *See* U.S. CONST. art. II, § 2 (providing that the president may appoint officers with the advice and consent of the Senate, provided that the officers' departments were created by law, meaning Congress).

34. *Id.*

35. *Id.*

36. *Id.*. *See also id.* art. I, § 8; A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30, 537 (1935) (describing Congress's power to create agencies, which did not include allowing it to delegate legislative power to industry trade groups).

But despite Article II's provisions, it was not always clear whether an "officer" was an "Officer of the United States," or an "inferior" officer.[37] This, then, posed the first of our questions regarding executive authority and administrative agencies: whether the President could freely remove agency heads.[38] The answer, it turned out, was "Yes . . . but only sometimes."[39]

Since the mid-twentieth century, courts and scholars have parsed agencies into roughly two categories, based in part on the distinction between "freely removable" and "protected" officers.[40] The first type, so–called executive agencies, are those agencies under the direct purview of the Executive Branch, whose officers may thus be removed by the President at his will.[41] Conversely, the other type, independent agencies, are more insulated from presidential control and removal.[42] Historically, independent agencies performed both "quasi-judicial" and "quasi-legislative" functions rather than "purely executive" ones.[43] Because of their status as entities not solely under the purview of the Executive Branch, independent agency heads have not been freely removable by the President, and instead, such heads can only be removed "for cause."[44]

Although the sharpness of the distinctions between executive and independent agencies has grown murkier over time, particularly with increased

37. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 668–69 (1988); Buckley v. Valeo, 424 U.S. 1, 125–26 (1976); Humphrey's Ex'r v. United States, 295 U.S. 602, 619 (1935); Myers v. United States, 272 U.S. 52, 238 (1926); *see* U.S. CONST. art. II, § 2.

38. *See Humphrey's Ex'r*, 295 U.S. at 619; *Myers*, 272 U.S. at 106.

39. *See, e.g., Morrison*, 487 U.S. at 691–93; *Humphrey's Ex'r*, 295 U.S. at 631–32; *Myers*, 272 U.S. at 238–39.

40. *See* Kagan, *supra* note 29, at 2250; *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (noting that presidential removal authority may be limited regarding independent agency heads).

41. *See Free Enter. Fund*, 561 U.S. at 483 (noting that courts have held that generally, the president can remove executive agency heads at will).

42. *Id.*

43. *See Humphrey's Ex'r*, 295 U.S. at 628–30.

44. *See id.* It should be noted that proponents of the unitary executive theory are generally dubious of this proposition; they believe that because the President heads the Executive Branch, he must be free to hire and fire agency heads. Where he cannot hire and fire them, and Congress cannot either, without going through impeachment processes, these agencies become a "headless" fourth branch, which is unaccountable to the electorate due to its insulation from all of the political branches. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 599, 663 (1994) (arguing that the unitary executive theory arises from the Constitution's plain text, instilling in the President power to take care the laws are faithfully executed).

disagreement over the "purely executive functions" rationale,[45] the general distinction between agencies is usually provided by their enabling statutes.[46] Congress can choose what kind of agency it wants to create through the agency's enabling statute, a distinction that bears other important consequences for the agency's future actions in addition to the removability of its head officer.[47]

After answering the first question about the President's power to remove agency heads, it still remained unclear whether he could exercise directive authority over executive agencies.[48] Directive authority refers to the President's ability to tell agencies how to act within their delegated authority.[49] Prior to the early 2000s, there were two main schools of thought on the issue. On the one hand, the traditional or "weak executive" view focused on the role of Congress in creating the agencies; in creating them, Congress delegated substantive policymaking authority to the agencies themselves.[50] Thus, the President should not alter their courses; instead, he is expected to defer to agencies' autonomous authority. At the same time, the President preserves his constrained authority, granted by the Constitution and enabling statutes of agencies, to appoint and remove officers.[51] As a result, Congress, as the agency's creator, or the agency itself, as a body of experts, should enjoy the most control over the agency's subsequent regulatory or adjudicatory decisions.[52]

Proponents of the unitary executive theory adopt the opposite view. Because administrative agencies are components of the Executive Branch, the President must have directive authority over all agencies, given that the

45. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 826 (2013) (arguing that there is no real, clear distinction between executive and independent agencies and proposing a sliding scale of independence).

46. If not clear, however, courts will gap-fill through statutory interpretation. Some agencies, for example, have been deemed to be independent with heads enjoying "for cause" removal protections despite the absence of such language from their enabling statute. The Securities and Exchange Commission is one such example. *See Free Enter. Fund*, 561 U.S. at 546–47 (assuming that the SEC chairman enjoys for cause removal protection despite statutory ambiguity).

47. Buckley v. Valeo, 424 U.S. 1, 138–39 (1976).

48. Kagan, *supra* note 29, at 2271 ("[C]ourts never have recognized the legal power of the President to direct even removable officials as to the exercise of their delegated authority.").

49. *See generally id.* at 2290 (describing various presidential directives to agencies).

50. *See id.* at 2255 (describing the rationale for congressional control of agencies); *see also id.* at 2261 (describing how, alternately, opponents of presidential control would support agencies' self-control based on their specifically delegated authority from Congress).

51. *See id.* at 2255.

52. *Id.*

Constitution vests the executive power solely in him.[53] Absent presidential control, agencies become a "headless fourth branch," with no accountability to the American public as they are comprised of appointed rather than elected officials.[54] Thus, they must answer to the President to ensure some level of accountability to the people.

Over time, however, many courts and scholars have come to accept a middle position, reconciling aspects of both approaches. Justice (then-Professor) Kagan articulated this approach in her seminal work, *Presidential Administration*.[55] Justice Kagan argued for a presumption of presidential directive authority over executive agencies, and a presumption against such authority for independent agencies.[56] This rationale arises from the agencies' enabling statutes.

In this way, where Congress creates an executive agency, over which the President enjoys free firing authority, it creates an agency of officials that are directly subordinate to the President. As his subordinates, the President may presumably direct these agencies to behave in certain ways.[57] Conversely, where Congress establishes an independent agency, which it presumably intended to be isolated from political influence,[58] the President presumably may not direct its actions.[59] In either case, the presumption may be overcome by a clear statement from Congress to the contrary; the presumptions operate only if Congress fails to express a preference, and courts and scholars are left to decide an agency's typology.[60]

Justice Kagan's presumption argument is buttressed by policy arguments that address concerns from both traditional and unitary executive theorists. First, presuming that the President may direct executive agency action accords with principles of political accountability and executive power, which go to the heart of the unitary executive theory.[61] Agency directors are appointed, not elected; allowing them to be directed by a democratically elected official—the President—helps introduce some political accountability into their decision-

53. U.S. CONST. art. II, § 1. *See also* Calabresi & Prakash, *supra* note 44, at 581; Kagan, *supra* note 29, at 2247.

54. *See generally* Calabresi & Prakash, *supra* note 44, at 663.

55. Kagan, *supra* note 29, at 2326.

56. *Id.* at 2326.

57. *Id.* at 2326–27.

58. *Id.* at 2326.

59. *Id.* at 2330–31.

60. *Id.* at 2327, 2330–31.

61. *Id.* at 2331–37.

making processes, which may otherwise be opaque to the public, and preserves his authority as the chief executive officer of the United States.[62]

Second, and the inverse of the first proposition, disallowing the President from directing independent agencies helps insulate these agencies from the political influences that Congress apparently wanted to keep out of their decision-making.[63] Third, Justice Kagan's presumptions incentivize Congress to be clear in its enabling statutes. In accordance with traditionalist concerns, this puts the onus on Congress to shape agencies' actions and agenda. Likewise, although it clearly does not conform to the exact contours of the unitary executive theory, implicating Congress also introduces another element of political accountability that helps prevent a "headless" fourth branch of independent agencies running amok with no oversight whatsoever. Finally, allowing presidential administration promotes efficient and effective agency governance; presidential oversight may help to prevent agencies from becoming set in their ways, or "ossified," and thus, encourages innovation in regulation.[64]

Although Justice Kagan's theory has many benefits, it likewise presents several concerns. Most importantly, for the purposes of this Article, it is unclear what—if any—limits exist on presidential direction of executive agencies. In her piece, Justice Kagan suggests that judicial review provides one solution, as courts could invalidate directives that were beyond the President's power or were clearly contradictory to existing law.[65] Yet, it is unclear exactly where to draw the line between mere policy preferences and directives contrary to prior law; it is likewise unclear if courts have embraced their role in checking the President's directive authority.[66] The question remains: How do these orders and their limits—or lack thereof—play out in the real world?

ii. Presidential Administration in Practice

The first President to truly test the waters of controlling agency action was Ronald Reagan. President Reagan campaigned on promises of smaller government and less regulation to improve economic outcomes for

62. *Id.* Justice Kagan also notes that the President, unlike members of Congress, serves a *national*, as opposed to purely local, constituency. This might help promote more agency accountability, as the President would (or at least arguably should) take national concerns into account in agency agenda-setting. *Id.* at 2335.

63. *Id.* at 2355.

64. *Id.* at 2341 (describing agency "energy" as an important facet promoted by presidential control). *See also id.* at 2344 (describing how partisan political gridlock in Congress can contribute to agency ossification).

65. *Id.* at 2372.

66. *See infra* Part II.B., Part III.

Americans.[67] And so the Reagan Administration set to work on attacking the source of most regulations targeting private behavior:[68] administrative agencies.[69] Specifically, Reagan directed executive agencies to comply with "supervisory" requirements intended to curb excessive or expensive regulation.[70] These deregulatory measures laid the groundwork for the presidential administration we know today.[71]

Reagan's novel exercise of authority over executive agencies received immediate criticism, including several legal challenges.[72] Executive Order No. 12,291 was the major catalyst for changing agency behavior and received the brunt of the challenges.[73] No. 12,291 specifically directed agencies to engage in cost-benefit analyses for major regulations and present these regulations for review by the Office of Internal Regulatory Affairs (OIRA), housed within the Office of Management and Budget (OMB).[74] This order, which sought to prevent regulations that were more costly than beneficial, was criticized as a violation of agency enabling acts, the Administrative Procedure Act (APA), and basic constitutional precepts of presidential power.[75] The plaintiffs argued that Reagan's order added requirements to agency regulation beyond those provided by the APA and the agencies' enabling acts, which govern their regulatory and adjudicatory processes.[76] Notably, the plaintiffs generally challenged agency actions stemming from the order, rather than attacking the order itself.[77] In any case, the order was never invalidated by courts, which instead found that

67. *See Ronald Reagan for President 1980 Campaign Brochure: 'Let's Make America Great Again'*, 4PRESIDENTS.ORG, http://www.4president.org/brochures/reagan1980brochure1.htm [https://perma.cc/P432-7C5S] ("Reagan calls for a ceiling on Federal spending and a crackdown on waste.").

68. *See* Stack, *supra* note 13, at 1988 ("[R]egulatory law, rather than the legislation authorizing the agencies to act, bears the weight of imposing obligations on private persons.").

69. *See* Kagan, *supra* note 29, at 2382; Exec. Order No. 12,291, 28 C.F.R. § 23 (1981).

70. Exec. Order No. 12,291, 28 C.F.R. § 23 (1981) (providing that agencies needed to submit proposed "major rules" to Regulatory Impact Analysis and review by the Office of Internal Regulatory Analysis (OIRA) within the Office of Management and Budget (OMB)).

71. Kagan, *supra* note 29, at 2277.

72. *See* Richard L. Gross, *Challenges to Presidential "Supervision" of Environmental Rulemaking*, 2 HOFSTRA ENV'T L. DIG. 22, 22–24 (1985); *see also* Kagan, *supra* note 29, at 2279–80 (describing scholarly criticism of Reagan's orders based on separation of powers and rule of law concerns).

73. Gross, *supra* note 72, at 22.

74. Exec. Order No. 12,291, 28 C.F.R. § 23 (1981).

75. *See* Gross, *supra* note 72, at 22–24 (describing legal challenges to Executive Order No. 12,291).

76. *Id.*

77. *See, e.g.*, Pub. Citizen Health Rsch. Grp. v. Brock, 823 F.2d 626, 627 (D.C. Cir. 1987) (describing the plaintiffs' challenge to the agency's delay in passing a health and safety regulation).

agencies could and should comply with both Order No. 12,291 as well as the APA's and enabling statutes' requirements.[78]

Scholars took note of these developments in presidential control of agencies and their anti-regulation stance.[79] Although it appeared that presidents could create hurdles to regulation, it was not clear whether they could actively accelerate deregulation.[80] Instead, scholars supposed that agencies, composed of experts or specialists in their field, would still lead the way in terms of deciding the substance of regulations.[81] This also suggested that this form of presidential oversight might be partisan in nature.[82] Republicans generally support decreased regulation and a free market, while Democrats typically support increased market intervention to correct for perceived market failures; scholars therefore assumed that Republicans would exercise Reagan's style of supervisory authority to curb regulation, while Democrats would let agencies have free-reign over the regulatory process.[83]

President Clinton quickly corrected this assumption.[84] Besides implementing his own method of cost-benefit analysis that sought to improve upon Reagan's process,[85] Clinton issued an array of executive orders and public memoranda directing agencies how and what to regulate.[86] Rather than slowing agency regulation, Clinton became the driving force behind many new regulations.[87] Although Clinton's directives did not always succeed in implementing his policy goals,[88] they did indicate an altogether new

78. *See, e.g.*, Nat. Res. Def. Council v. EPA, 683 F.2d 752, 761–66 (3d. Cir. 1982) (finding that the EPA violated the APA but could have avoided doing so while still complying with No. 12,291 through passing different rule amendments and providing sufficient justification); *Pub. Citizen Health Rsch. Grp.*, 823 F.2d at 629 (although the court found the agency's delay in regulating "disappointing," it could only require them to stick to their set schedule rather than fashioning any relief allowing the agency to not comply with the cost-analysis executive order).

79. *See* Kagan, *supra* note 29, at 2249 ("[P]residential supervision of administration inherently cuts in a deregulatory direction.").

80. *Id.* at 2248–49.

81. *Id.*

82. *See id.*

83. *See id.*

84. *Id.* at 2282.

85. *Id.* at 2247–48.

86. *Id.* at 2248–50, 2281–83 (describing Clinton's presidential oversight of administrative agencies).

87. *Id.* at 2281.

88. *Compare* William J. Clinton, *The President's News Conference*, *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: ADMINISTRATION OF WILLIAM J. CLINTON 1237 (1995) (directing or "authorizing" the FDA to promulgate new regulations to stop tobacco companies from marketing their products to children), *with* FDA v. Brown & Williamson Tobacco, Corp., 529 U.S.

development in the realm of presidential power. Clinton's agency directives sought to influence not just the process, as Reagan's directive had, but the substance of agency regulations.[89] Indeed, Clinton's orders sometimes sought to replace the legislative process after Congress failed to pass the same or similar measures that Clinton wanted to impose.[90] These new and substantive directive orders also drew criticism from lawmakers, scholars, and litigants.[91] But, although some of his directives were ultimately made ineffectual by courts, Clinton continued exercising directive authority.[92] The majority of his agency directives remained in place until George W. Bush assumed office in early 2001.[93]

President Bush wasted little time in reversing some of his predecessor's directives.[94] He, too, received criticism for his use of presidential power, although most dissidents were focused on his use of presidential power in the "War on Terror."[95] In any case, Bush continued the pattern of agency oversight, with the key difference between him and his predecessor typically being the substance of these directives.[96] Again, Bush's orders, and the agencies

120, 161 (2000) (invalidating an FDA regulation prohibiting advertising tobacco products to young adults and teens where it exceeded the scope of the FDA's authority).

89. Kagan, *supra* note 29, at 2248–50 (contrasting Clinton's and Reagan's approaches to presidential administration).

90. *Id.* at 2248; *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 35–36 (describing how Clinton's orders sought to replace legislation).

91. *See, e.g., Brown*, 529 U.S. at 161 (invalidating FDA regulations promulgated in accordance with Clinton's directives); Separation of Powers Restoration Act, H.R. 864, 107th Cong. (2001) (introduced in response to what was perceived as President Clinton's excessive use of executive authority during his tenure); Branum, *supra* note 90, at 38–42 (describing Clinton's "misuse" of the executive order and scholarly criticism thereof).

92. *See, e.g.*, Chamber of Com. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) (invalidating an Executive Order that sought to implement measures to prevent employers from being able to discharge employees for striking).

93. *See* Branum, *supra* note 90, at 34 ("Although the basis for presidential action is sometimes unclear, these actions nevertheless often go unchallenged.").

94. *See id.* at 44–47 (describing policy-oriented directives made during George W. Bush's first year in office, which reversed course from Clinton's policies).

95. Notably, presidential war-making authority has received increasing scrutiny in recent decades, particularly as Congress has taken an increasingly hands-off approach to presidential direction of war-making and foreign relations in general. *See also id.* at 50–56 (describing various war-related presidential orders). *See generally* Devins & Fisher, *supra* note 16, at 79 (discussing how Congress and court have ceded war-making authority to the President regularly since the latter years of the 20th century).

96. Some of these focused on deregulatory or other cost-cutting measures, akin to President Reagan. *See, e.g.*, Exec. Order No. 13,457, 73 Fed. Reg. 6417 (Feb. 1, 2008) (directing agencies to

following them, generated criticism and litigation,[97] and again, the vast majority of them stayed in place and in effect.[98]

This revolving door of substantive agency direction continued during President Barack Obama's time in office, as he sought to implement key elements of his agenda that Congress rejected. Perhaps the most famous, or infamous, example of this was the Obama Administration's public memorandum providing for deferred action for childhood arrivals of undocumented immigrants (DACA).[99] Obama's directive to executive officials to refuse enforcement of specific immigration laws against these specific individuals arguably stretched the limits of presidential power. Can the President and his staff direct agencies and subordinate officials to refuse to follow congressional directives?[100] Challengers, however, failed to make any real headway against DACA.[101]

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cut costs through targeting wasteful spending practices); Exec. Order No. 13,450, 72 Fed. Reg. 64519 (Nov. 13, 2007) (directing agencies to coordinate with a newly established Performance Improvement Council in order to ensure agency effectiveness and avoid waste). Others implemented still different policy goals, *see* Exec. Order No. 13,443, 72 Fed. Reg. 46537 (Aug. 16, 2007) (directing agencies to include hunters' interest when making decisions on fish and wildlife protection or other policies); Exec. Orders No. 13,202–13,204, 66 Fed. Reg. 11225–28 (Feb. 17, 2001) (revoking several of President Clinton's executive orders on labor relations).

97. *See* Branum, *supra* note 90, at 47–50 (describing a legal challenge to one of Bush's executive orders, which sought to reverse a Clinton-era directive).

98. *See* John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 337 (2010) ("[C]ourts have overturned only two executive orders since 1789.").

99. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizen & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enf't. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/B5QL-CCWH].

100. Commentators have disagreed as to the propriety of DACA, as well as the propriety of such broad anti-enforcement directives in general. *Compare* Kevin J. Fandl, *Presidential Power to Protect Dreamers: Abusive or Proper?*, 36 YALE L. & POL'Y REV. 1, 2 (2018) ("When future policymakers look back on DACA, they should see it not as an aberration from constitutional governance, but as a model of one legitimate way for presidents to respond to sweeping federal statutes that lack enforcement guidelines."), *with* Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1769 (2016) ("Even if the Faithful Execution Clause does not itself constrain other executive officials, it is difficult to see how the President could ensure faithful execution of the laws without the ability to demand faithful execution by his subordinates . . . .").

101. Although challenges to DACA's expansion succeeded, the original memorandum remained in effect. *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015) (granting preliminary injunctive relief against the implementation of an expanded version of DACA that would include parents of undocumented children), *aff'd,* 136 S. Ct. 2271 (2016); *see also* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., No. 18–587, slip op. at 31 (S. Ct. June 18, 2020) (finding that the Trump Administration's rescission of DACA was arbitrary and capricious in violation of the APA).

And so a pattern emerged: Presidents direct agencies to reverse the policies of their predecessors or reject congressional inaction, while courts hesitate to invalidate these (increasingly extreme) orders.[102] Since at least the 1990s, critics have noted the Supreme Court's discomfort with adjudicating certain challenges to presidential authority.[103] Thus, while presidents have sometimes ignored congressional directives and substituted their own policies,[104] courts have been reluctant to adjudicate these claims, instead often dismissing them on standing grounds.[105] Congress, meanwhile, especially since the 1990s, has faced frequent deadlock, with members from the President's party staunchly supporting presidential actions and those from the other party indiscriminately opposing presidential actions.[106] Meanwhile, the explicitly partisan substance of presidential directives to agencies causes agency actions to pendulate from one administration to the next.[107] As such, orders that undermine Congress and the Constitution remain in place, unchecked by either the Judiciary or the Legislature, until a new president arrives to undo them.

Donald Trump assumed office in 2017, and like presidents before him, wasted no time in substituting his own policy directives for those of his

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102. *See* Branum, *supra* note 90, at 59–60 (describing how courts rarely act to invalidate likely unconstitutional presidential orders, and on the rare occasions that they do invalidate parts of them, provide such a narrow holding as to only confuse future courts adjudicating similar claims); Devins & Fisher, *supra* note 16, at 63 (describing how the Supreme Court has failed to hold the president accountable for dubiously lawful orders); Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on* Marbury v. Madison*, Executive Action, and the Duty of Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 253–55 (2003) (arguing that the President has not always been held accountable for contravening congressional intent, particularly in recent decades).

103. Devins & Fisher, *supra* note 16, at 75; Cheh, *supra* note 102, at 288; Siegel, *supra* note 11, at 1654.

104. Cheh, *supra* note 102, at 253–55 (describing patterns of presidential noncompliance with Congress and court inaction).

105. *Id.*; *see also* Devins & Fisher, *supra* note 16, at 75; Branum, *supra* note 90, at 60.

106. *See also* Kagan, *supra* note 29, at 2344 ("[P]artisan differences were superimposed on institutional differences, and the system increasingly succumbed to the phenomenon (and, indeed, by now the cliché) of gridlock."). *See generally* Joseph P. Tomain, *Gridlock, Lobbying, and Democracy*, 7 WAKE FOREST J. L. & POL'Y 87, 88 (2017) (describing the prevalence of partisan gridlock and governing through inaction).

107. *See, e.g.*, Exec. Order No. 12,800, 57 Fed. Reg. 12985 (Apr. 13, 1992) (containing an order by President George H.W. Bush requiring federal employees be notified they are not required to join a union); Exec. Order No. 12,836, 58 Fed. Reg. 7045 (Feb. 1, 1993) (containing an order by President Clinton that employers and contractors are not required to post anti-union notices, reversing Bush's previous order); Exec. Order No. 13,201, 66 Fed. Reg. 11221 (Feb. 22, 2001) (containing an order by President George W. Bush providing that federal employers must post a specific notice providing their employees are not required to join a union, which reversed Clinton's order); Exec. Order No. 13,496, 74 Fed. Reg. 6107 (Jan. 30, 2009) (containing an order by President Barack Obama providing that federal employers should post a different notice informing employees of their rights under the National Labor Relations Act, which reversed Bush's earlier order).

predecessors and previous Congresses.[108] For example, just as promised during his campaign, the Trump Administration purported to revoke Obama's DACA mandate. Although Obama's order itself was questionable,[109] Trump's revocation raised further questions about presidential power to revise a predecessor's orders.[110] Indeed, a divided Supreme Court only recently concluded that the Trump Administration's rescission was unlawful because it failed to adequately explain its decision under the APA.[111] But the attempted DACA rescission was not the only reversal of Obama-era policy that Trump pursued; he reversed course on almost all areas of agency regulation, including fossil fuels development,[112] pollution,[113] the preservation of endangered species,[114] consumer and worker safety,[115] and non-discriminatory employment

108. *See, e.g.*, Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017) (directing all executive agencies involved to refuse compliance with the Affordable Care Act to the extent they have discretion to do so, pending its potential repeal); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (directing agencies to undertake cost-only analyses of prior and new regulations in order to decrease the total number and costs of administrative regulations); Exec. Order No. 13,778, 82 Fed. Reg. 12497 (Feb. 28, 2017) (purporting to adopt Justice Scalia's interpretation of the term "waters of the United States," which is much less environmentally protective than the interpretation adopted by a majority of the Supreme Court); Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (revoking an order focused on climate change impacts and substituting pro-oil and gas development directives to agencies); Exec. Order No. 13,792, 82 Fed. Reg. 20429 (Apr. 26, 2017) (directing review of previous national monument designations under the Antiquities Act); Exec. Order No. 13,795, 82 Fed. Reg. 20815 (Apr. 28, 2017) (purporting to revoke President Obama's withdrawals of land from oil leasing under the Outer Continental Shelf Leasing Act).

109. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., No. 18–587, slip op. at 46–47 (June 18, 2020) (Thomas, J., dissenting).

110. *See id.* at 14 (characterizing the DACA case as being about what an agency must do, procedurally, to reverse a prior administration's policies).

111. *See id.* at 20–21, 28–31 (finding that the Trump Administration offered inadequate "post hoc rationalizations" of the decision to terminate DACA and failed to adequately address reliance interests in DACA, rendering the decision arbitrary and capricious).

112. *See* Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

113. *See* Exec. Order No. 13,778, 82 Fed. Reg. 12497 (Feb. 28, 2017) (purporting to limit water pollution law by altering the definition of "waters of the United States").

114. *See* Exec. Order No. 13,807, 82 Fed. Reg. 40463 (Aug. 15, 2017) (directing expedited environmental permitting practices in favor of infrastructure and economic development).

115. *See* Exec. Order No. 13,811, 82 Fed. Reg. 46363 (Sept. 29, 2017) (indicating that an advisory committee on worker safety will not be continued); *see also* Ian Kullgren, *Trump Rolls Back Worker Safety Rules*, POLITICO (Sept. 3, 2018, 8:23 AM), https://www.politico.com/story/2018/09/03/trumps-worker-safety-regulations-protections-unions-806008 [https://perma.cc/55CX-V6QG]; Renae Merle & Tracy Jan, *Trump is Systematically Backing Off Consumer Protections, to the Delight of Corporations*, WASH. POST (Mar. 6, 2018, 9:00 AM), https://www.washingtonpost.com/business/economy/a-year-of-rolling-back-consumer-protections/2018/03/05/e11713ca-0d05-11e8-95a5-c396801049ef_story.html [https://perma.cc/T94U-JQZZ].

practices.[116] And so the pendulum of presidential preference swung further rightward than ever before, but nonetheless stayed in line with the development of presidential administration in recent decades.[117]

Of course, like his predecessors, Trump's orders have been challenged in court. Although at least one of his executive orders has been invalidated for exceeding presidential constitutional and statutory authority,[118] courts have rejected many claims based on procedural grounds, specifically for lack of standing.[119] Standing is a jurisdictional requirement of judicial review, but it is not always applied uniformly.[120] Inconsistent judicial application of standing requirements and the Supreme Court's winding road of standing case law, particularly in environmental claims, illustrate this confusion.[121]

What is more, adjudication of environmental claims and standing issues becomes even murkier when coupled with the issue of presidential power.[122] Courts have grounded their refusal to adjudicate claims challenging presidential power in various rationales in addition to standing, including sovereign

116. *See* Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 41 C.F.R. § 60 (2019) (proposing a rule that would expand the religious exemption for federal contractors, allowing them to discriminate against LGBT applicants on the basis of religious beliefs).

117. *Compare* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (directing agencies to designate two regulations for repeal for each new regulation proposed), *with* Exec. Order No. 12,291, 28 C.F.R. § 23 (1981) (directing agencies to examine costs and benefits of certain proposed regulations).

118. *See League II*, 363 F. Supp. 3d 1013, 1031 (D. Alaska 2019) (vacating part of Exec. Order No. 13,795).

119. *See, e.g.*, Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1300 (D. Or. 2019) (dismissing a challenge to Exec. Order No. 13,783 for failure to state a claim and standing); Pub. Citizen, Inc. v. Trump, 361 F. Supp. 3d 60, 87 (D.D.C. 2019) (denying the plaintiffs' motion for summary judgment, leaving the case's future uncertain).

120. *See generally* Roger Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, 1 J. ENV'T L. & LITIG. 65, 65 (1986) (describing how jurisdictional and procedural requirements of standing, ripeness, implied rights action, and exhaustion of remedies, have prevented numerous environmental claims from being adjudicated on their merits).

121. *See* David Sive, *supra* note 26, at 49–58 (describing the various and sometimes contradicting Supreme Court decisions on environmental standing); *see also* Cheh, *supra* note 102, at 273 n.96 ("Standing has proved to be a particularly nettlesome issue in administrative law. The courts have sometimes applied the rules strictly but, at other times, have relaxed them.").

122. *See* David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1016 (2018) (describing the general dearth of guiding case law for review of executive orders that pose constitutional questions); Devins & Fisher, *supra* note 16, at 75 (describing the trend of decreasing judicial review of presidential directives with constitutional implications, particularly in areas deemed suited to the executive over courts or even Congress).

immunity and separation of powers concerns.[123] In this way, although courts have rebuked some Trump Administration policies,[124] plaintiffs have been much less successful in challenging the executive orders directing unlawful agency action head-on because of these procedural hurdles.[125] But even if plaintiffs obtain review on the merits of their challenge, such as by targeting the agencies implementing an order, courts' deference to agency judgments may ultimately lead to the same result.[126] Such deference is particularly problematic where agencies appear to make decisions based not on their own expertise, as Congress intended,[127] but instead on purely political reasons.[128]

Overall, despite the fact that many Trump orders contradict congressional intent, courts generally avoid adjudicating direct challenges against them.[129] Several recent—and mostly unsuccessful—cases challenging executive orders illustrate this pattern of non-adjudication.

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123. *See* Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1548–53 (1993); Cheh, *supra* note 102, at 283 (describing courts' reluctance to interfere with questions of executive discretion and enforcement); Siegel, *supra* note 11, at 1622 (describing sovereign immunity's potential barriers to adjudication); *see also* Devins & Fisher, *supra* note 16, at 75 ("By making aggressive use of ripeness and standing limitations, for example, courts have refused to hear lawmaker challenges to unilateral presidential war-making.").

124. *See, e.g.*, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018) (enjoining the Trump Administration's efforts to stop accepting DACA applicants), *aff'd,* No. 18–587, slip op. at 29 (June 18, 2020); *League II*, 363 F. Supp. 3d 1013, 1031 (D. Alaska 2019) (vacating a revocation of a withdrawal of land on the outer-continental shelf from oil leasing).

125. *See supra* notes 119–20 and accompanying text.

126. *See* David A. Dana & Michael Barsa, *Judicial Review in an Age of Hyper-Polarization and Alternative Facts*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 231, 233 (2018) (arguing against overly deferential approaches to reviewing agencies' changes in opinion based on alleged expertise: "Courts cannot now readily assume that agencies' technical, expert, 'factual' analyses and conclusions are well-supported."). *See generally* Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (articulating a standard of deferential review for agency decisions absent a clearly contrary congressional directive).

127. *See* Dana & Barsa, *supra* note 126, at 232 ("[P]artisan disagreement is not limited to values, but also directly implicates facts."); Cheh, *supra* note 102, at 267 (describing how congressional intent is supposed to prevail over agency policies that appear to contradict it).

128. *See* Dana & Barsa, *supra* note 126, at 239–40 (describing the Trump Administration EPA's attempt to disguise its policy-driven reversals of Obama-era decisions as questions of expertise in order to solicit judicial deference).

129. *See, e.g.*, Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1300 (D. Or. 2019) (dismissing the plaintiffs' challenge to an executive order promoting fossil fuel development for lack of standing); City & Cnty. of San Francisco v. Whitaker, 357 F. Supp. 3d 931, 953 (N.D. Cal. 2018) (finding that local government plaintiffs failed to demonstrate standing to challenge an executive order and agency action taken pursuant to it).

B. Barriers to Challenging Recent Executive Orders

Within a month of assuming office, President Trump issued numerous orders to effectuate his campaign promises.[130] Straightaway, various groups challenged these orders as unconstitutional or otherwise contrary to law.[131] But like the orders of his predecessors, Trump's agency directives have largely remained unadjudicated—let alone invalidated.[132] There have been a few exceptions to this trend; in what follows, we describe some of the ongoing challenges to Trump orders and their varying degrees of success.

i. Challenging the Two-for-One Rule: *Public Citizen, Inc. v. Trump*

One of Trump's earliest orders was Executive Order No. 13,771. No. 13,771 institutes three barriers to agency rulemaking: (1) it directs agencies to designate two existing regulations for repeal for each new regulation proposed; (2) in conjunction with the first requirement, it directs agencies to offset costs of new or continuing regulations by repealing or refusing to enforce previous rules; and (3), it directs agencies to abide by an annual cap on the net costs of regulated parties.[133] Because of its first requirement, this order is generally known as the "two-for-one rule." Shortly after the two-for-one rule was signed, several public and environmental advocacy groups—Public Citizen, Inc., the Natural Resources Defense Council, and the Communications Workers of America, AFL-CIO—filed suits challenging the order.[134] In *Public Citizen, Inc. v. Trump*,[135] the plaintiffs focused on the direct impact of the order; namely,

130. *See generally* Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017) (purporting to advance the repeal of the Affordable Care Act); Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (directing agencies to expedite environmental review of important infrastructure projects); Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (directing federal agencies to cooperate in order to ramp up southern border security).

131. *See Animal Legal Def. Fund*, 404 F. Supp. 3d at 1298 (challenging Exec. Order No. 13,783); *League II*, 363 F. Supp. 3d 1013, 1033 (D. Alaska 2019) (challenging Exec. Order No. 13,795); Hopi Tribe v. Trump, No. 17-cv-2606, slip op 2494161 (D.D.C. March 20, 2019) (challenging Exec. Order No. 13,792); Pub. Citizen, Inc. v. Trump, 361 F. Supp. 3d 60, 68 (D.D.C. 2019) (challenging Exec. Order No. 13,771); *Whitaker*, 357 F. Supp. 3d at (challenging Exec. Order No. 13,777).

132. *Compare Animal Legal Def. Fund*, 404 F. Supp. 3d at 1302 (dismissing the plaintiffs' challenge to an executive order), *and Whitaker*, 357 F. Supp. 3d at 953 (dismissing the plaintiffs' challenge to an executive order and ensuing agency action), *with League II*, 363 F. Supp. 3d at 1031 (vacating part of an executive order purporting to revoke President Obama's withdrawal of outer-continental shelf lands from oil leasing), *and* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 512, 520 (9th Cir. 2018) (awarding preliminary injunctive relief to prevent the Trump-era DHS from rescinding DACA protections), *aff'd,* No. 18–587, slip op. 29 (June 18, 2020).

133. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

134. *See* First Amended Complaint for Declaratory and Injunctive Relief, Pub. Citizen, Inc. v. Trump, No. 17-253 (D.D.C. April 21, 2017) [hereinafter First Amended Complaint].

135. Pub. Citizen, Inc. v. Trump, 297 F. Supp. 3d 6 (D.D.C. 2018).

it brought agency regulation to a halt.[136] Moreover, unlike previous executive orders that targeted excessive costs or overregulation, the two-for-one rule directed agencies to focus solely on the costs of their regulations, without regard for any benefits.[137]

Thus, the two-for-one rule appears to contravene agency enabling acts and the APA, which direct agencies to focus on specific factors—like regulations' benefits—in their decision-making process.[138] Likewise, although some enabling statutes have been construed to allow or even require agencies to consider costs in making their regulatory decisions, others have been construed to forbid consideration of costs altogether. Confusion results when an agency is directed to follow the two-for-one rule, which provides for a course of action clearly in conflict with the agency's own enabling act. Even though the two-for-one rule purports to direct agencies to follow its dictates only so far as law allows, the cost-centric nature of the order sends a clear message to agencies: Deregulate, regardless of the benefits of regulation, to cut costs. In turn, this supersedes congressional commands to promulgate and enforce rules beneficial to society, sometimes regardless of costs.[139] Orders like the two-for-one rule, which elevate cost considerations over the factors Congress intended agencies to consider, thereby unlawfully usurp legislative authority, substituting presidential preference for existing legal mandates.[140]

In challenging the two-for-one rule, the *Public Citizen* plaintiffs pointed to a variety of previously proposed regulations that had been indefinitely delayed or withdrawn, apparently in compliance with the two-for-one rule.[141] The affected regulations included: (1) a regulation that had been proposed by the Federal Motor Carrier Safety Administration (FMCSA) and the National Highway Traffic Safety Administration (NHTSA) to increase vehicle safety by promoting technology for vehicle-to-vehicle communications;[142] (2) a regulation that the Occupational Health and Safety Administration (OSHA)

136. First Amended Complaint, *supra* note 134, ¶¶ 3–9 (describing the Order and its effects as unlawful under agency enabling statutes, the Administrative Procedure Act, and Article I of the Constitution).

137. *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (focusing solely on costs); see *supra* Part II.a.ii (describing Presidents Reagan, Clinton, Bush, and Obama's supervisory orders, which provided for cost-benefit analyses).

138. *See generally* First Amended Complaint, *supra* note 134.

139. *See, e.g.*, 42 U.S.C.A. § 7409 (West 2012); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468–71 (2001) (holding that the EPA may not consider costs when determining national air quality standards).

140. *See* First Amended Complaint, supra note 134, ¶¶ 56–63.

141. *See generally id.* ¶¶ 64–124.

142. *Id.* ¶¶ 68–69.

was considering in order to minimize workers' exposure to the potential carcinogen styrene;[143] and (3) two proposed rules by the EPA that would have gradually ended the use of a harmful chemical, trichloroethylene, in dry cleaning facilities,[144] among others.[145]

Overall, the plaintiffs argued that the two-for-one rule violates the United States Constitution, specifically Article II.[146] By telling agencies to add prohibited considerations, or at least considerations that were not explicitly allowed by Congress, to their rulemaking calculus, the President violated his duty to ensure laws are "faithfully executed,"[147] and in fact, usurped legislative authority by superimposing his policies over those of Congress.[148] In response, and as expected based on the trend of dismissing environmental claims for lack of standing, the Government moved to dismiss the plaintiffs' claims for lack of standing.[149]

Standing has three threshold requirements.[150] First, plaintiffs must show an actual or imminent threat of injury-in-fact—a particularized, concrete harm to a plaintiff, rather than a generalized grievance common to all Americans or a speculative threat.[151] Second, plaintiffs must show that the alleged injury is "fairly traceable" to defendant's wrongful conduct.[152] Third, the injury must be something that courts can redress.[153]

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143. *Id.* ¶¶ 77–81.

144. *Id.* ¶¶ 90–93.

145. The plaintiffs further alleged that the Order violated a number of statutes that require agencies to consider specific factors in making regulatory decisions, in some cases prohibiting the agencies from considering costs. *See id.* ¶¶ 118–24 (describing how the Order contradicts the Clean Air Act); *id.* ¶¶ 110–17 (describing how the Order contradicts the ESA); *id.* ¶¶ 103–09 (describing how the Order contradicts the Energy Policy and Conservation Act); *id.* ¶¶ 64–102 (describing an array of other statutes implicated and potentially violated by the Order). The plaintiffs also pointed to a number of other delayed or withdrawn rules, and they expanded even further upon these in their Second Amended Complaint. *See generally* Second Amended Complaint for Declaratory and Injunctive Relief, Pub. Citizen, Inc. v. Trump, No. 17-253 (D.D.C. 2018) [hereinafter Second Amended Complaint].

146. *See* Second Amended Complaint, *supra* note 145, ¶¶ 1–4, 8, 127–43. *See generally* 42 U.S.C.A. § 7409 (West 2012); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

147. U.S. CONST. art. II, § 3; First Amended Complaint, *supra* note 134, ¶¶ 134–43.

148. *See* U.S. CONST. art. I; First Amended Complaint, *supra* note 134, ¶¶ 128–30.

149. Pub. Citizen, Inc. v. Trump, 297 F. Supp. 3d 6, 12 (D.D.C. 2018). *See generally* Sive, *supra* note 26, at 58 (discussing the challenges of demonstrating standing in environmental cases).

150. *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 17; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

151. *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 17; *see also Lujan*, 504 U.S. at 560.

152. *Pub. Citizen, Inc.,* 297 F. Supp. 3d at 17*; see also Lujan*, 504 U.S. at 560.

153. *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 17*; see also Lujan*, 504 U.S. at 561.

Focusing on the *Public Citizen* plaintiffs' failure to show that their members had suffered or would imminently suffer an actual injury based on the delayed or withdrawn rules, the district court agreed with the government, finding that the plaintiffs had no standing to challenge the order.[154] After all, there is no affirmative right to have specific regulations passed.[155]

The court did, however, allow the plaintiffs to file an amended complaint, which survived a second motion to dismiss.[156] They specifically added language to support a finding of "purchaser standing," which arises where an individual is deprived of the opportunity to purchase a desired product.[157] In this case, the plaintiffs were deprived of the ability to purchase vehicles with a "vehicle-to-vehicle communication" safety feature that would have been promoted by the NHTSA's and FMCSA's delayed rule.[158] The court pointed to the agencies' own earlier findings that regulation was necessary to ensure uniform application of the new feature; although car companies started introducing the feature in their new vehicles, absent a governing uniform standard, the features are less useful than what the companies had originally promised.[159]

So, the court bought the plaintiffs' new standing argument—at least for now. Notably, the court denied both the Government's motion to dismiss and the plaintiffs' motion for summary judgment on the issue of standing, which would have resolved the matter.[160] In deciding whether to grant the plaintiffs' motion for summary judgment, the court surveyed the alleged injury and causation elements linked to five delayed rules targeted by the complaint.[161] For each of these, the court identified at least one potential defect that prevented the *Public Citizen* plaintiffs from demonstrating standing as a matter of law.[162]

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154. *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 22.

155. *See id.* at 40 (distinguishing the plaintiffs' claims here regarding failure to regulate from ones where plaintiffs were "directly regulated" by enacted regulations). *See generally* Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004) (finding that the plaintiffs could not compel regulation under the APA merely because it was desirable and might benefit them).

156. Pub. Citizen, Inc. v. Trump, 361 F. Supp. 3d 60, 64 (D.D.C. 2019); *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 40; Second Amended Complaint, *supra* note 145, ¶ 1.

157. *See* Second Amended Complaint, *supra* note 145, ¶¶ 73–75. *See also Public Citizen, Inc.*, 361 F. Supp. 3d at 73–76 (finding that the plaintiffs had adequately alleged purchaser standing to sue).

158. *Pub. Citizen, Inc.*, 361 F. Supp. 3d at 74.

159. *Id.* at 72–74.

160. *Id.* at 92.

161. *Id.* at 84.

162. *See id.* at 83–91. The court focuses mainly on the injury and causation requirements; it focuses on causation in particular because redressability, the third requirement, is typically conceived of as the natural corollary of causation. *Id.*

First, the court found that the plaintiffs still could not show injury beyond all dispute for several of their specific claims.[163] The driving force behind this finding was that the plaintiffs challenged an *absence* of regulation, rather than an actual regulation that caused some sort of clear change to their rights or interests.[164] Therefore, although the plaintiffs could challenge agency action for failing to accord with statutory directives or for being arbitrary and capricious, it would be much more difficult to challenge inaction.[165] Is an individual actually injured by an agency's failure to promulgate a desired regulation? Would they have been considered injured if the agency had never even considered promulgating such a regulation? Such questions can be difficult to answer conclusively enough to establish an injury-in-fact as a matter of law.[166]

Second, even where the *Public Citizen* plaintiffs demonstrated a concrete, particularized injury-in-fact, they were still unable to show causation.[167] Like the injury requirement, causation is confounded by the unique circumstances surrounding directive executive orders.[168] In particular, agencies can attempt to defeat, or at least call into question, the plaintiffs' causation arguments by pointing to a multitude of alternative reasons for their actions.[169] Further, agencies are not required to publicize the rationale for their decisions to delay rules to the same degree as their decisions to enact new rules, meaning that complainants have no way of knowing causation beyond the agencies' post hoc justifications that emerge during litigation.[170]

Finally, because the agencies could deny a clear causal connection, redressability remains uncertain.[171] Even if the court invalidated the two-for-

163. *Id.* at 84–91.

164. *See id.* at 64 ("It is not the Court's role to decide which proposed regulations should, or should not, be adopted, nor is it the Court's role, absent a statutory directive, to set a timetable for an agency to act.").

165. The APA specifically provides for review of agency "action." 5 U.S.C.A. § 704 (West 2018) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

166. *See Pub. Citizen, Inc.*, 361 F. Supp. 3d at 64. ("It is relatively easy to establish standing when you are the regulated party; it is more difficult to do so when the government fails to regulate the conduct of someone else.").

167. *See generally id.*

168. *See generally id.*

169. *See id.* at 86 (describing how the Government proposed various alternative reasons for delays apart from the challenged two-for-one rule).

170. Although agencies may be required to articulate a "reasoned explanation," they retain the ability to provide alternative and misleading explanations that deflect responsibility from the executive order, if the Government so decides. *See id.* at 86.

171. *Id.* at 65.

one rule, that would not necessarily mean that the agencies would implement the previously proposed regulations.[172] Instead, agencies can provide any number of "reasoned explanations" for changing their policies and choosing not to issue the plaintiffs' desired regulations.[173] Thus, while the plaintiffs presented sufficient facts to allow them to evade another dismissal, they were not entitled to summary judgment.[174] Although the *Public Citizen* case continues, it may yet be decided based on standing grounds, never even requiring the court to consider the validity of the two-for-one rule if it chooses not to.[175]

Of course, even if a court reaches the merits of this claim, agency inaction is not subject to the same scrutiny that agency action is; the Supreme Court established a presumption of *no* judicial review for certain types of agency (in)action.[176] This precedent only deepens the murky waters surrounding the question of whether the agencies or the President acted unlawfully. And this question becomes even more concerning when one considers the heart of the plaintiffs' claims in *Public Citizen*—that the President violated his constitutional duty to ensure that the laws be "faithfully executed" and instead usurped legislative authority through his orders, overriding lawfully enacted legislation.[177] Certainly, ordering agencies to do their best to avoid complying with the spirit of existing statutes at least skirts the edge of presidential power. But with standing requirements as they are, and with statutes and Supreme Court precedents limiting judicial review of agency (in)action,[178] courts can only do so much to adjudicate such claims, no matter their constitutional implications. As this Article argues, courts can and should exercise judicial review over such problematic orders. Other cases illustrate, however, that courts have not yet embraced this approach.

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172. *See id.* at 91 ("One could only speculate . . . about whether the relevant agency would agree to issue the proposed rule.") (internal quotation marks omitted).

173. *Id.* at 77.

174. *Id.* at 90–92.

175. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 422 (2013) (dismissing the plaintiffs' claims on standing grounds); *see also* Mass. v. EPA, 549 U.S. 497, 535 (2007) (Roberts, J., dissenting) (stating that he would not have decided the merits of the plaintiffs' claims where they lacked standing to challenge EPA inaction).

176. *See* Heckler v. Chaney, 470 U.S. 821, 832–33 (1985) (noting a rebuttable presumption of no judicial review for certain actions committed to agency discretion). *But see Mass.*, 549 U.S. at 526 (allowing a challenge to the EPA's refusal to regulate greenhouse gas emissions under the Clean Air Act).

177. *See* Second Amended Complaint, *supra* note 145, ¶¶ 128–37.

178. *See Heckler*, 470 U.S. at 837–38; *see also Amnesty Int'l*, 568 U.S. at 409; *Mass.*, 549 U.S. at 527–28.

ii. Other Challenges to Executive Orders: Lessons of Pitfalls and Successes

Regardless of what courts could do to check potentially unconstitutional presidential administrative directives, the fact is that they frequently fail to do so. A brief overview of other cases challenging President Trump's recent executive orders reveals a similar pattern, and it suggests that the *Public Citizen* case is a success story compared to similar actions. For example, in a case challenging Executive Order No. 13,777 (a companion to the two-for-one rule), a district court ruled that the plaintiff local government entities could not even demonstrate standing under the more lenient standard applied to governments suing on behalf of their citizens or residents.[179] Likewise, in a case challenging Executive Order No. 13,783, which directs agencies to promote oil and gas development in the United States, a district court found that the plaintiffs could not show an alleged injury-in-fact stemming from the order's pro-fossil fuels directive and its link to climate change-causing conduct.[180]

On the other hand, executive orders that purport to exercise the President's delegated authority pursuant to a statute, rather than merely directing agencies how to utilize their delegated authority, have been more easily challenged.[181] *League of Conservation Voters v. Trump* (*League II*)[182] exemplifies this proposition. There, the plaintiffs successfully challenged Executive Order No. 13,795 as an unlawful act beyond the scope of the President's delegated authority under the Outer Continental Shelf Leasing Act (OCSLA) and the Constitution.[183] No. 13,795 purported to revoke previous presidents' withdrawals of land from oil leasing on the outer continental shelf.[184] The

179. City & Cnty. of San Francisco v. Whitaker, 357 F. Supp. 3d 931, 942 (N.D. Cal. 2018).

180. Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1300 (D. Or. 2019).

181. A possible exception is where the President declares some "emergency," ostensibly pursuant to statute, as is the case with respect to the recent Executive Order entitled "Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities," dated June 4, 2020, in which President Trump purported to exercise emergency powers under the National Environmental Protection Act, the Clean Water Act, and the Endangered Species Act, to remove procedural requirements related to infrastructure permitting. Exec. Order No. 13,927, 85 Fed. Reg. 35165 (June 4, 2020). In this case, it is unclear whether the declared "emergency" is sufficiently related to infrastructure permitting or whether the statutes in question allow the President to remove the procedural barriers. Also unclear is the extent to which such an Executive Order may be challenged and how closely a court will scrutinize a President's claims of "emergency." However, a full analysis of the question of "emergency" Executive Orders is beyond the scope of this paper, given that it involves detailed questions concerning the particular statutes in question, the nature of the supposed emergency, and the relationship of the "emergency" to the action the President wishes to take.

182. *League II*, 363 F. Supp. 3d 1013, 1017 (D. Alaska 2019).

183. *Id.* at 1030.

184. *Id.* at 1020.

plaintiffs alleged that this order was unlawful where OCSLA only provides the President with authority to make withdrawals of land in the first place; it never says that Presidents may later undo these withdrawals.[185] The court ultimately agreed with the plaintiffs' interpretation of the statute, therefore vacating the order.[186]

In this case, too, the Government sought to dismiss the plaintiffs' complaint on the basis of standing.[187] The court, however, found that the plaintiffs established standing.[188] First, the plaintiffs alleged specific aesthetic and recreational injuries that they would suffer if oil leasing was allowed on the previously withdrawn arctic lands.[189] These harms included disruptions to the natural environment and area wildlife, which the plaintiffs enjoyed viewing, studying, and, in some cases, using for subsistence purposes.[190] Additionally, the court found that the injuries alleged were fairly traceable to order No. 13,795, which demonstrated a desire to expedite oil leasing in the area and directed agencies to act with all haste to maximize potential oil extraction in the area.[191] Thus, the court found that the plaintiffs had sufficiently demonstrated standing to sue based on the Order and its impending effects on the outer continental shelf areas that the plaintiffs used.[192]

Finally, the court found that the plaintiffs' injuries were redressable.[193] Although the Government contended that redressing the plaintiffs' claims would implicate troubling separation of powers concerns, the court dismissed these arguments.[194] A finding against the validity of the order would not elevate the district court above the President.[195] Courts can invalidate congressional acts as unconstitutional, and there is no reason why they should not also be able to invalidate executive orders as unconstitutional or otherwise unlawful. As the Government noted, courts have—for better or for worse—found that they generally cannot issue relief directly against a sitting President.[196] No matter, the court ultimately found, because invalidating an order does not require an

185. *Id.*

186. *Id.* at 1031.

187. League of Conservation Voters v. Trump (*League I*), 303 F. Supp. 3d 985, 992 (D. Alaska 2018).

188. *Id.* at 995–1001.

189. *Id.* at 1000–01.

190. *Id.*

191. *Id.* at 998–99.

192. *Id.* at 995–1001.

193. *Id.* at 995.

194. *Id.*

195. *See id.*

196. *Id.*

injunction or other relief to be issued against the President himself, just as invalidating an unlawful statute does not require relief against Congress itself.[197] If necessary, the court could simply enjoin lower executive officials against enforcing the invalid order, a relatively common practice.[198] The court therefore resolved the claim against the President's unlawful order rather neatly, in contrast to the challenges to his purely directive, agency-focused orders.[199] This decision is currently being appealed to the Ninth Circuit;[200] from there, it may even end up in the Supreme Court.

What can be gleaned from all of these cases? Although Justice Kagan's proposed solution of judicial review seems plausible, standing analyses hinders its actual application in challenges to arguably unlawful presidential directives to agencies. As demonstrated by *Public Citizen* and other cases, plaintiffs challenging presidential directives to agencies have difficulties meeting standing requirements, often resulting in dismissal. If plaintiffs cannot even get their claims heard on their merits due to jurisdictional hurdles, then there is no way in which judicial review can be used to check malfeasance in presidential administration.

But perhaps this should not be the case. In *League of Conservation Voters* (*League I*), the court found that the plaintiffs demonstrated both the injury and the causation requirements, despite the fact that the order had not yet led to any drilling on the outer continental shelf.[201] It sufficed that the order directed agencies to promote oil drilling and that industry interest indicated it would be occurring soon.[202]

One might still wonder if the President's agency directives really should be invalidated, especially if agencies have other conceivable reasons for not following Congress's intended policies. Perhaps the courts are right. Perhaps executive orders like the two-for-one rule and its ilk are not so problematic, or at least not more so than orders issued by earlier presidents. Although Trump's orders may seek to undercut the intent of earlier Congresses, Clinton's orders likewise sought to compensate for his Congress's failure to pass his desired

197. *Id.*

198. *See id*; *League II*, 363 F. Supp. 3d. 1013, 1017 n.16 (D. Alaska 2019).

199. Other plaintiffs have also challenged President Trump's purported revocation of the Bears' Ears National Monument under the Antiquities Act. *See* Hopi Tribe v. Trump, No. 17-cv-2606, slip op 2494161 (D.D.C. March 20, 2019). This case, however, has not seen much progress in the way of judicial review. It is still undergoing amicus briefing based on the court's most recent order.

200. Notice of Appeal, League of Conservation Voters v. Trump, No. 19-35461 (D. Alaska May 29, 2019).

201. *League I*, 303 F. Supp. 3d at 997.

202. *See id.* at 998.

policy goals.[203] Are the two really so different? And if they are not, does it matter?

The next Parts address these questions, concluding that these executive orders are uniquely troubling and ought to be considered by courts.[204] Even if Trump's orders merely represent a continued development of presidential administration, such a pattern cannot continue—its logical progression results in aggrandizing the Executive Branch at the expense of the Legislature, thereby subordinating the basic elements of our constitutional system.[205] What is more, Congress's failure to check the President[206] and courts' continued abdication[207] of resolving claims against these troublesome orders publicly promotes this evolving, blatant constitutional violation; such a pattern slowly degrades the rule of law, and with it, the democratic norms and integrity upon which our entire system relies for proper functioning. Courts, in contrast, have the power to check violative orders but often find themselves unable to do so under current standing interpretations.

III. THE DANGEROUS NATURE OF CONTRARIAN EXECUTIVE ORDERS

Executive orders directing agency action are now commonplace. Yet the limitations on this form of presidential administration remain unclear. As such, the President, acting alone and unchecked, has directed agencies to stray from the statutes that provide their procedures. This unilateral decision-making is the opposite of the constitutionally dictated legislative process, which involves debates, amendments, and usually requires compromise by lawmakers from both parties before a bill can become law. Such deliberate decision-making

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203. *See* Kagan, *supra* note 29, at 2248.

204. *See infra* Parts III, IV.

205. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"); U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *see also* Branum, *supra* note 90, at 20 ("The Founding Fathers recognized that a representative body of many individuals constituted the best mode of making laws. Any lawmaking by one individual would immediately introduce the danger of tyranny.").

206. *See* F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 83 (2018) ("Presidential ambitions now consistently overwhelm those of the Congress with the result that the power of the presidency has now become far greater than the framers may have imagined . . . .").

207. *See* Driesen, *supra* note 122, at 1039 ("[T]he court imagines that separation of powers concerns argue against robust judicial review of presidential actions."); *id.* at 1044 n.187 (arguing that the court has failed to explain "how abdicating meaningful review can be squared with rule of law"); Devins & Fisher, *supra* note 16, at 81 ("Unlike *Youngstown* [the Steel Seizure Case] . . . , today's courts seem oblivious to their constitutional duty to analyze and interpret legal boundaries [particularly in national security matters].").

safeguards against mob rule government and arbitrary lawmaking.[208] Even where administrative agencies are the ones making regulations, as opposed to Congress itself, these agencies have been directed to engage in deliberative, quasi-adversarial procedures involving input from parties to be regulated or benefitted by regulation through the "notice-and-comment" process.[209] Rather than basing decisions on the whims of administrators (or presidents), agencies must follow certain information-gathering steps, or run the risk of having their actions invalidated as "arbitrary and capricious."[210] Therefore, the presidential directives that contradict Congress and are made without such a deliberative process directly undermine the democratic safeguards imbued in the Constitution and in statutes like the APA. This is particularly worrisome given the American public's increasing distrust of government officials.

Further, executive directives that contradict law and circumvent administrative processes put in place to promote rule of law principles, like transparent and justified lawmaking,[211] only exacerbate this distrust. These orders, often accompanied by public statements regarding the President's intent,[212] make clear the President's distaste for and perceived elevation above the law. The disregard that the President shows for the law, in turn, creates at least the appearance of a corrupt or otherwise illegitimate government. And in this context, anti-law orders further reinforce public distrust in government. In sum, the current system of presidential administration has spiraled further and

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208. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–87, 208–10 (1998) (describing the arguments for a bicameral legislature); *id.* at 247 ("A single legislature naturally tended toward despotism, which fact the Constitution with its numerous checks on the Assembly apparently had recognized.").

209. *See* 5 U.S.C.A. § 553(c) (West 2019) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

210.

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). *Accord* Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019); Nat. Res. Def. Council v. EPA, 658 F.3d 200, 215 (2d Cir. 2011).

211. *See infra* Part III.B (discussing rule of law principles in the administrative context).

212. *See, e.g.*, Christian Alexandersen, *Executive Orders, Travel Bans and Angry Tweets: Trump's First 100 Days in Office*, PATRIOT NEWS (Apr. 26, 2017), https://www.pennlive.com/nation-world/2017/04/executive_orders_and_angry_twe.html [https://perma.cc/Z63M-S9QE].

further into a precarious constitutional predicament; now, we must find a way out.

A. Declining Confidence in Constitutional Democracy and the Rule of Law

Some might suggest that most Americans lack enough awareness of President Trump's troubling orders for them to have any real impact on public trust in government.[213] One could argue that the groups challenging agency regulations and their guiding executive orders are not truly representative of the perceptions of the public.[214] This may seem particularly likely given the American public's presumed distaste for politics. Indeed, a significant number of Americans do not participate in elections nor pay attention to political developments.[215]

But perhaps rather than simply indicating political apathy, this level of disengagement with governmental processes may also stem from the public's increasing distrust and dislike of their leaders and lawmakers. In one 2012 study on trust in government and perceived corruption, a measly one-fourth of respondents reported trusting elected officials to generally "do what is right."[216] Another recent study found that only about one-fifth of respondents report trusting government officials.[217] These numbers have plummeted since the 1960s, when approximately three-fourths of survey respondents indicated that they trusted elected officials to act in the public interest.[218]

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213. *See generally* Scott Rasmussen, *Contrary to Media Coverage, Most Americans Aren't That Into Politics*, AM. SPECTATOR (Aug. 29, 2018, 12:00 AM), https://spectator.org/contrary-tomedia-coverage-most-americans-arent-that-into-politics [https://perma.cc/TV2W-6QWA]; George Gao, *1-in-10 Americans Don't Give a Hoot About Politics*, PEW RSCH. CTR. (July 7, 2014), https://www.pewresearch.org/fact-tank/2014/07/07/1-in-10-americans-dont-give-a-hoot-aboutpolitics [https://perma.cc/825U-LUE8].

214. *Compare* Rasmussen, *supra* note 213, *with Trump Administration Lawsuit Tracker*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/campaigns/trump_lawsuits/index.html [https://perma.cc/H579-FYEH] (tallying the numerous suits against Trump filed by The Center for Biological Diversity and other groups).

215. *See* Rasmussen, *supra* note 213; Gao, *supra* note 213.

216. Robertson, Winkelman, Bergstrand & Modzelewski, *supra* note 23, at 376 (quoting Pew Research Center); *Public Trust in Government: 1958–2014*, PEW RSCH. CTR. (2014), http://www.people-press.org/2014/11/13/public-trust-ingovernment [https://perma.cc/ZX5E-VP8S].

217. Maggie Koerth, *In American Politics, Everyone's a Cynic*, FIVETHIRTYEIGHT (Dec. 17, 2019, 6:00 AM), https://fivethirtyeight.com/features/in-american-politics-everyones-a-cynic [https://perma.cc/Q6EC-7TXW].

218. Robertson, Winkelman, Bergstrand & Modzelewski, *supra* note 23, at 376.

Commentators have suggested numerous potential reasons for this precipitous decline,[219] including the Watergate scandal and the relaxation of campaign finance laws,[220] which allowed a greater influx of corporate money into the electoral process.[221] No matter the causes, public distrust of politicians is at or close to an all-time high. Many Americans see the political process as infiltrated by special interests and corporations, with lawmakers making decisions based on the interests of their donors rather than the general welfare.[222]

To make matters worse, in addition to government distrust, political culture has reached a zenith of polarization; even if elected officials are inclined to act in the public interest, contemporary political dynamics frequently result in legislative stalemate.[223] The President can then circumvent this stalemate through administrative agencies to achieve certain policy goals—goals that are unilaterally developed and often contrary to those instituted by past presidents and congresses.[224] And yet another element complicating matters in the presidential administration context is the increasing skepticism among both the public and elected officials of experts using fact-based decision-making.[225] Such circumstances only increase public cynicism and distrust.[226]

Moreover, just as with elected officials, agencies are frequently criticized for bowing to special interests over expertise in making their administrative decisions.[227] This has been particularly true with President Trump's recent

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219. *See id.* (describing perceptions during the 1960s as including decreased public trust in government and potentially increased apathy).

220. *See* Michael Hiltzik, *Five Years After* Citizens United *Ruling*, *Big Money Reigns*, L.A. TIMES (Jan. 24, 2015, 9:09 PM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150125column.html [https://perma.cc/KQ9G-GCUG]; *Watergate and the Legacy of Distrust*, CHI. TRIB. (June 17, 1992), https://www.chicagotribune.com/news/ct-xpm-1992-06-17-9202230536-story.html [https://perma.cc/3QHY-Y9T9].

221. Hiltzik, *supra* note 220.

222. *See id.* ("Legislation plainly in the public interest, whether about equal pay or environmental protection or educational and economic opportunity, is routinely dismissed because those measures will be opposed by corporate interests or plutocrats.").

223. *See* Molly J. Walker Wilson, *The Rhetoric of Fear and Partisan Entrenchment*, 39 LAW & PSYCHOL. REV. 117, 126–27, 148–49 (2015) (describing the cyclical nature of strong campaign rhetoric and polarization that cement gridlock conditions).

224. *See supra* notes 106, 110, 111, 112, 113, 114, 115, 131 and accompanying text (describing the dramatic policy shifts between presidential administrations affecting administrative agencies). *See also* Dana & Barsa, *supra* note 126, at 248–55 (describing the vacillations between the Bush, Obama, and Trump administration's views on vehicle mileage standards).

225. Dana & Barsa, *supra* note 126, at 233.

226. *See* Wilson, *supra* note 223, at 152; Koerth, *supra* note 217.

227. *See* Wilson, *supra* note 223, at 126; Koerth, *supra* note 217.

appointments of industry insiders to top posts at agencies.[228] In addition to the woes of industry capture, agency actions are guided by presidential directives that are not only anti-regulatory, but anti-law. And so this is the current context. Cracks of distrust and corruption creep into the governmental structure on all sides. Between the Legislative and Executive Branches, no one seems safe from corrupting influence. Even courts, the counter-majoritarian guardians of constitutional rights, have come under fire for apparent partisanship.[229]

This disturbing combination of corrupting factors has left commentators wondering what can be done to quell the swell of conduct contrary to the rule of law.[230] Federal courts, as politically insulated and unaccountable officials, appear to be in the best position to protect against this growing corruption. Executive orders that undermine Congress are only one of a myriad of symptoms of a government in turmoil, but courts can and should do their part in resisting constitutional collapse and enforcing existing protections against unlawful presidential directives, particularly given the threat they pose to the rule of law.

B. Executive Orders and Rule of Law Problems

There is some debate among scholars as to the precise elements and parameters of the rule of law,[231] but it is often cited as one of the crucial

228. *See* Derek Kravitz, Al Shaw & Isaac Arnsdorf, *What We Found in Trump's Drained Swamp: Hundreds of Ex-Lobbyists and D.C. Insiders*, PROPUBLICA (Mar. 7, 2018, 12:00 PM), https://www.propublica.org/article/what-we-found-in-trump-administration-drained-swamphundreds-of-ex-lobbyists-and-washington-dc-insiders [https://perma.cc/UUL4-YMZY]; Phil Stewart, *McCain Warns Trump over Staffing Pentagon with Industry Insiders*, REUTERS (Nov. 16, 2017, 5:54 PM), https://www.reuters.com/article/us-usa-trump-pentagon/mccain-warns-trump-over-staffingpentagon-with-industry-insiders-idUSKBN1DG39N [https://perma.cc/4GZE-AMYD].

229. *See* Fred Barbash, *'Assault on Democracy': A Siting Federal Judge Takes on John Roberts, Trump and Republicans*, WASH. POST (Mar. 11, 2020, 5:03 AM), https://www.washingtonpost.com/nation/2020/03/11/lynn-adelman-roberts-trump [https://perma.cc/N38E-GLSP] (describing Judge Lynn Adelman's forthcoming article critiquing conservative justices on the Roberts Court); Ari Shapiro, *Political Scientist Weighs in on Trump Criticism of 9th Circuit Court of Appeals*, NPR (Nov. 22, 2018, 4:28 PM), https://www.npr.org/2018/11/22/670313813/political-scientist-weighs-inon-trumps-criticism-of-9th-circuit-court-of-appeal [https://perma.cc/4DPR-YFWQ] (describing President Trump's criticism of the 9th Circuit Court of Appeals and the potential partisanship of judges).

230. *See, e.g.*, Dana & Barsa, *supra* note 126, at 259–64 (highlighting the importance of judicial review for checking agency abuse of discretion and arbitrary or capricious decision-making in the current, hyper-polarized governmental climate).

231. *See* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001) ("[I]t is not clear what precise characteristics the rule of law must possess . . . ."); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997).

components of a constitutional democratic government.[232] In addition to the oft recited maxim that no one—not even the President—is above the law, there are a few other principles generally associated with the rule of law.[233] Such principles include predictability,[234] transparency,[235] and justification,[236] among others.[237] In other words, laws should be created and enforced in a way that is predictable, transparent, and justified by the circumstances.[238] Applying these principles to lawmaking and law-enforcing processes helps promote confidence in the system; where laws are created, applied, and enforced consistently with rule of law precepts, citizens have greater confidence that no one is above and beyond the law's reach.[239] This encourages compliance with and recognition of the law's legitimacy.[240]

Conversely, where the public perceives that laws are created, applied, and enforced erratically, unfairly, and without sufficient justification, then faith in the rule of law disappears.[241] Diminished confidence in the rule of law corresponds with diminishing perceptions of the system's legitimacy; the rule of law is the "cornerstone" of constitutional democracy, and when that cornerstone begins to crumble, so too does the rest of the structure of government.[242]

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232. *See* Rosenfeld, *supra* note 231, at 1307 ("The rule of law is a cornerstone of contemporary constitutional democracy.").

233. *See* Stack, *supra* note 13, at 1987.

234. *See* Rosenfeld, *supra* note 231, at 1326 ("[L]aw's predictability in a complex social universe is no guarantee of its legitimacy, but it does make for an important step in that direction.").

235. *See* Stack, *supra* note 13, at 1993 ("A central virtue of the rule of law is procedural fairness, that is, the set of institutional arrangements that provide an unbiased determination of one's rights and duties through transparent procedures . . . .").

236. *See id.* at 1992–93 ("[P]ublic power is considered authoritative when and only when it justifies its exercise to those whom it affects."); David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, *in* COMMON LAW THEORY 134, 152 (Douglas E. Edlin ed., 2007) ("[P]ublic power is considered authoritative when and only when it justifies its exercise to those whom it affects.").

237. *See* Stack, *supra* note 13, at 1987 (also naming authorization, notice, and coherence as key rule of law principles for lawmaking and adjudicating).

238. *See id.* at 1992.

239. *See* Rosenfeld, *supra* note 231, at 1351 (describing general adherence to rule of law principles as necessary, if not sufficient, for the maintenance of a legitimate, constitutional democracy).

240. *See id.*

241. *See id.*

242. *See id.* at 1307; Fallon, *supra* note 231, at 4 (asking, amidst a system of mixed administrative powers and potential judicial activism, "[W]hat, if anything, could be left of the Rule of Law?").

Traditionally, the United States' system of government is characterized by a theory of representative democracy,[243] comprised of three branches of government that create, apply, and enforce laws.[244] Today's laws, however, are increasingly created not by Congress but by administrative agencies, which may also take on adjudicatory and enforcement roles.[245] Many of the processes that were confined to the three discrete, coequal, and counterweighted branches in the Constitution are consumed by the administrative state. Thus, given the numerous duties these agencies undertake and their impact on private behavior, rule of law principles may be even more vital to agency decision-making than to traditional congressional action.[246]

Congress and courts have attempted to account for these principles, at least to an extent. The APA provides for judicial review of agency actions (including rulemaking, adjudications, and enforcement actions) that are arbitrary, capricious, or otherwise unlawful.[247] Courts, though deferential to agencies,[248] nonetheless maintain review and remand power over final agency actions.[249] Litigants and courts can therefore check agency actions that stray from Congress's commands;[250] when agencies take such dubious actions, they not only violate law, but the rule of law as well—a crucial safeguard against illegitimate governance. The requirement of notice-and-comment rulemaking, for example, forces agencies to provide justification for and transparency in the rulemaking process by receiving input from affected parties and presenting an administrative record responding to parties' concerns.[251] When agencies fail to follow this process or make decisions that are not justified by it, courts can

243. *See* WOOD, *supra* note 208, at 81 (describing the interaction between democratic elections and representational government which would "work to blend the interests of the people and their rulers") (internal quotation marks omitted).

244. U.S. CONST. art. I (vesting the legislative power in Congress and providing for bicameralism and presentment requirements); *id.* art. II (vesting the executive power in the President); *id.* art. III (vesting the judicial power in the Supreme Court and lower federal courts if created by Congress).

245. *See* Fallon, *supra* note 231, at 3–4; Stack, *supra* note 13, at 1986.

246. *See* Stack, *supra* note 13, at 1986.

247. 5 U.S.C.A. § 706 (West 2019).

248. *See, e.g.*, Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984); Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

249. 5 U.S.C.A. § 706 (West 2019); *see also* Mass. v. EPA, 549 U.S. 497, 516 (2007) (holding that petitioners were subject to judicial review per the APA); Citizens To Pres. Overton Park, Inc., v. Volpe, 401 U.S. 402, 410 (1971).

250. *See Mass.,* 549 U.S. at 533–35 (remanding for EPA to provide a reasonable explanation of its decision regarding greenhouse gases, global warming, and whether regulation was warranted under the Clean Air Act).

251. *See* 5 U.S.C.A. § 553 (West 2019) (providing for notice and comment rulemaking).

reverse those rules and direct agencies to improve their processes.[252] In this way, some mechanisms for rule of law enforcement already exist in the administrative context.

On the other hand, some elements of agency decision-making are more difficult to reconcile with rule of law principles. One of these principles is predictability: the notion that laws will be made and enforced in familiar and understandable ways.[253] Despite concerns of agency ossification, agencies generally face much less inertia against rulemaking than Congress does with its bicameralism and presentment requirements.[254] Additionally, agencies are headed by individuals appointed by the President. These individuals and the President are therefore empowered to exert tremendous influence over agency action, leading to a pattern of back-and-forth, right-to-left-to-right-again policy movement.[255]

The pendulum of policymaking generally accords with the President's political views, but exactly how policies will change after each new President takes office is not always clear.[256] And even when it is clear, pendulating policies nonetheless add instability to the administrative context.[257] Contrary to the APA and agency enabling acts, which provide for expert, deliberate decision-making, agencies following presidential directives appear to make decisions more or less at the whim of the President.[258] The public nature of these orders only exacerbates this perception, with the President directing agencies to take actions like not listing new endangered species,[259] repealing two regulations for each new regulation imposed,[260] rejecting climate

252. *See, e.g.*, Penobscot Indian Nation v. U.S. Dep't of Hous. & Urban Dev., 539 F. Supp. 2d 40, 46 (D.D.C. 2008) (remanding based on finding that HUD violated the notice-and-comment requirements of the APA); Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1076, 1100 (N.D. Cal. 2007) (remanding based on finding that U.S. Forest Service failed to provide for sufficient notice-and-comment on a proposed rule by interested parties).

253. *See* Rosenfeld, *supra* note 231, at 1337–39 (describing the trouble with using case-by-case determinations and narrow precedents to create predictability in lawmaking and adjudication).

254. *See* Kagan, *supra* note 29, at 2344–46 (describing how Presidential administration can increase agency "energy" and decrease ossification and gridlock).

255. *See supra* notes 106, 110, 111, 112, 113, 114, 115, 131 and accompanying text.

256. *See, e.g.*, Kagan, *supra* note 29, at 2315 (describing the speculation and uncertainty as to how George W. Bush's Administration and orders would build on or depart from those of his predecessors).

257. *See id.* at 2248–51.

258. *See* Second Amended Complaint, *supra* note 145, ¶¶ 1–8, 55–61 (alleging that agency inaction and unlawful delays ensued from the executive order); *see supra* Part I.

259. *See supra* Part I.

260. *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

science,[261] and other initiatives based solely on policy preferences. Although these policy changes may happen naturally with the appointment of new agency heads, they are further exacerbated by presidential directives specifically designed to erase those of their predecessors.

It is well within the President's purview to adopt certain policy stances; it is not, however, within the purview of administrative agencies to adopt and apply these policies without due consideration of the factors Congress intended to guide agency decision-making, such as "the best scientific and commercial data available."[262] Thus, these policy-focused directive orders not only introduce instability by forcing agencies to vacillate wildly from one policy position to another, thereby leading to irregularities in agency actions over the years, but also occlude the transparency and justification of the lawmaking process by directing agencies to do their best to ignore Congress's procedural commands.[263] The two-for-one rule, for example, directs agencies to designate two regulations for repeal for each new regulation it seeks to impose.[264] Such a direction is inherently contrary to the intent behind statutes such as the Clean Air Act, which seeks to continuously improve public health and air quality without consideration of costs at particular stages.[265] It is unclear how the EPA will fulfill the President's directive to deregulate where it is supposed to be maintaining and increasing regulations to improve public health and environmental outcomes.[266]

Although these executive orders all contain language purporting to direct agencies to comply with them, solely to the extent permissible by law,[267] they

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261. *See* Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (revoking Exec. Order No. 13,653, 78 Fed. Reg. 66817 (Nov. 06, 2013) (directing certain agency actions to prepare the United States to face climate change)).

262. 16 U.S.C.A. § 1533(b)(1)(A) (West 2018).

263. *Compare id.* (providing that endangered or threatened status should be based on "the best scientific and commercial data available"), *and* 42 U.S.C. § 7408(a)(2) (stating that air quality regulations should be decided based on factors relating to the public health and welfare), *with* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (providing that agencies should designate two regulations for repeal for each new regulation imposed and be sure to offset costs of new regulations through repealing prior regulations).

264. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

265. *See, e.g.*, clean Air Act, 42 U.S.C. § 7401–7671q; *Clean Air Act Overview*, ENV'T PROT. AGENCY, https://www.epa.gov/clean-air-act-overview/clean-air-act-text [https://perma.cc/H53V-SRGE].

266. *See* Second Amended Complaint, *supra* note 145, ¶¶ 149–55 (describing how the EPA is forced to choose between following Congress's mandate in the Clean Air Act, which has been construed not to allow consideration of costs, and the two-for-one rule, which requires consideration of costs in passing new regulations).

267. *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) ("This order shall be implemented consistent with applicable law.").

clearly undermine the laws that delegated rulemaking authority to these agencies by essentially telling them to ignore what Congress intended and to do what the President wants. By undermining constitutionally enacted laws, these orders likewise contravene the rule of law itself: It might be apparent that agencies are behaving differently due to new presidential directives, but statutes require them to provide other, sufficient justifications for their decisions; "the president told me to do it" and "because we just prefer this policy" are not acceptable justifications for agencies changing course.[268] But rather than completely preventing arbitrary agency decisions, agencies may still convince courts of the legality of their rules with an alternative, post hoc rationale.[269] These misleading explanations and half-truths are anything but consistent with the rule of law principles of transparency, justification, or predictability.

This is not to say that courts will always ignore problematic orders like the ones discussed here,[270] but numerous orders have been allowed to stand due to jurisdictional limitations.[271] Plaintiffs often lack standing to directly challenge even the most blatantly problematic executive orders, and are forced to challenge agency actions instead.[272] Even where plaintiffs succeed in discrediting the agencies' proffered rationales and courts order them to revise their decision, the orders that drove these actions remain in place. Agencies are then trapped between trying to comply with both the President's and Congress's contradictory commands.[273]

Furthermore, when courts invalidate agency action without touching upon the President's orders, they persist in the backdrop of public imagination. This is not to say that every American is waiting and watching for legal challenges to executive orders to be decided with bated breath—not everyone cares about

268. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) (finding that agency decisions to rescind regulations must be justified by "reasoned analysis," and changes in policy and agency discretion are not sufficient).

269. *See* Pub. Citizen, Inc. v. Trump, 361 F. Supp. 3d 60, 92–93 (D.D.C. 2019) (finding that agencies had provided sufficient explanations for their deregulatory decisions to preclude summary judgment against them and Executive Order No. 13,771).

270. *See, e.g.*, *League II*, 363 F. Supp. 3d 1013, 1031 (D. Alaska 2019) (vacating part of Exec. Order No. 13,795).

271. *See, e.g.*, *Pub. Citizen, Inc.*, 361 F. Supp. 3d at 92 (denying plaintiff's motion for summary judgment against Exec. Order No. 13,771).

272. *See id.* (denying the plaintiffs' motion for summary judgment on the adequacy of standing); *see also* Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1300 (D. OR. 2019) (dismissing the plaintiffs' complaint for lack of standing).

273. *See, e.g.*, Nat. Res. Def. Council v. EPA, 703 F.2d 700, 703 (3d Cir. 1983) (holding that although the EPA violated the APA by justifying its decision to indefinitely postpone a regulation solely due to Exec. Order No. 12,291, the EPA could have complied with both the APA and the executive order despite the order's anti-regulatory stance).

every law, but some people care a great deal about some laws. Further, the number of legal challenges to recent executive orders and agency actions demonstrate that many Americans attend to and are concerned by the President's agency directives.[274] These plaintiffs, among other commentators, are disturbed by the implications of these executive orders, recognizing their troubling implications for important rule of law principles—such as predictability, transparency, and justification—that are crucial to the continuing action of the administrative state.[275] Even if these executive orders really are not as troubling as they seem, the mere appearance of malfeasance that they create endangers the continued legitimacy of democratic government.[276]

These concerns are even more pressing in light of the fact that these executive orders undermine the rule of law, a crucial component of our constitutional democratic system.[277] In this way, allowing courts to evaluate these orders may help remediate at least some of the rule of law concerns that such orders and ensuing agency actions present. Finding that plaintiffs have standing to challenge such orders opens the door to real judicial review. And judicial review—though it may not always result in victory for plaintiffs—provides one critical check on these orders and their implications for the rule of law and constitutional values.

The Supreme Court itself recently expressed concerns about both the substance of president-led policy vacillation among agencies and the rule of law concerns that this vacillation creates. The 2019 Census Question Case, *Department of Commerce v. New York*,[278] demonstrates the Court's increased concerns over presidential administration as of late. In that case, the Government also tried to assert that the decision to ask a citizenship question on the 2020 census was not subject to judicial review, and thus, the plaintiffs had no standing, a familiar argument in presidential administration cases.[279] The Court, of course, rebuked this.[280] At oral argument, several Justices also

274. *See, e.g.*, *Animal Legal Def. Fund*, 404 F. Supp. 3d at 1298 (D. OR. 2019); *Pub. Citizen, Inc.*, 361 F. Supp. 3d at 63; City & Cnty. of San Francisco v. Whitaker, 357 F. Supp. 3d 931, 939 (N.D. Cal. 2018); *see also* Rasmussen, *supra* note 213 (the Center for Biological Diversity has participated in 179 lawsuits against Trump agency actions, often working with groups such as the Sierra Club, the Center for Food Safety, and other concerned groups).

275. *See* Stack, *supra* note 13, at 1987.

276. *See supra* Part III.A.. *See infra* Part III.C.

277. *See* Rosenfeld, *supra* note 231, at 1307.

278. 139 S.Ct. 2551 (2019).

279. Transcript of Oral Argument at 6, Dep't of Com. v. New York, 139 S. Ct. 2551 (2019) (No. 18-966).

280. *See Dep't of Com.*, 139 S. Ct. at 2565 (finding that the plaintiffs had sufficiently shown standing to bring the claim).

brought up concerns regarding the agency's justification—or lack thereof—of its decision to add a citizenship question in light of scientific data that showed the question would decrease the census's accuracy.[281]

This rationale carried into the Court's opinion, delivered by Chief Justice Roberts. Although the Chief Justice acknowledged that there is a role for presidential policy preferences in agency decision-making, there was "a significant mismatch between the decision the Secretary made and the rationale he provided."[282] In other words, agencies cannot just follow presidential policy preferences and then attempt to justify their policy-driven decisions. They must follow the APA, which requires them to justify their decisions transparently. Here, the agency failed to do so; the reasons for its decision were pretext meant to justify preordained policy preferences.[283]

Although this case did not address a specific executive order, its sentiment still rings true in the presidential administration context. Purely outcome-driven policy rationales cannot justify agency actions where the APA and enabling statutes require factual support. This remains true whether the President, the Secretary, or another official provides uninformed policy motivations for agencies to follow. The Census Question Case then affirms the idea that judicial review can check problematic, anti-Congress orders—if, of course, plaintiffs can show standing to challenge the order at issue.[284]

Agency justification and transparency issues also emerged in *DHS v. Regents of the University of California*,[285] the DACA Case. The majority opinion, again authored by Chief Justice Roberts, held the Trump Administration's rescission of the DACA policy arbitrary and capricious under the APA.[286] The Court noted that the Administration offered "post hoc rationalizations" to explain its decision to rescind DACA in full, and specifically failed to consider reasonable alternatives and reliance interests in maintaining DACA.[287] Moreover, by failing to provide an adequately reasoned analysis, the Trump Administration failed to observe "important values of

281. Transcript of Oral Argument at 21–42, Dep't of Com. v. New York, 139 S. Ct. 2551 (No. 18-966). Justice Kagan, in particular, also noted the fact that much of the Government's argument justifying the decision came in the form of "post hoc rationalization," found only in the Solicitor General's briefs rather than in any actual agency decisions. *Id.* at 30–31.

282. *Dep't of Com.*, 139 S. Ct. at 2575.

283. *Id.* at 2574–76.

284. *See supra* Part II.B. (plaintiffs may have difficulties showing standing in presidential administration cases).

285. No. 18-587, slip op. at 9 (June 18, 2020).

286. *Id.* at 26.

287. *See id.* at 15–16, 21–26.

administrative law," specifically the APA's justification requirement that promotes agency transparency and accountability.[288]

Of course, the legality of DACA itself was also dubious; it directed the DHS and Immigration and Naturalization Service (INS) not to enforce the Immigration and Naturalization Act (INA) as written.[289] Moreover, the INA does not explicitly delegate authority to the DHS to make such large-scale decisions about non-removals of a class of immigrants, especially where DACA further conferred substantive benefits like work authorization, Social Security, and Medicare.[290] Thus, from dissenters' point of view, because DACA policy was not a lawful exercise of executive authority to begin with, its rescission should stand, as any decision not to break the law would.[291]

Justice Sotomayor alone pointed out the questionable underlying motivations behind DACA's rescission. Although the administrative officials purportedly rescinded DACA largely because of its illegality, President Trump purported to seek DACA's rescission because of blatant dislike of undocumented persons, specifically Mexican migrants and immigrants.[292] Although the majority found that the Trump Administration failed to adequately justify its rescission, it effectively ignored the President's numerous anti-Mexican statements, describing them as "unilluminating" in spite of their clear link to the DACA rescission.[293]

The tensions of the DACA case—and the very divided opinions of the Justices—highlight the troubling nature of dubiously lawful presidential orders. As Justice Thomas noted, requiring more from administrations seeking to reverse unlawful orders incentivizes presidents to implement dubious legal measures before leaving office, knowing that their successor will struggle to reverse them.[294] But failure to invalidate ill-reasoned reversals that likewise

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288. *Id.* at 16 ("Requiring a new decision before considering new reasons promotes 'agency accountability' . . . . Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply 'convenient litigating position[s].'" (alteration in original) (citations omitted)).

289. *See id.* at 47 (Thomas, J., dissenting).

290. *See id.* at 42 (Thomas, J., dissenting).

291. *Id.* at 47 (Thomas, J., dissenting) ("The decision to rescind an unlawful agency action is *per se* lawful.").

292. *Id.* at 36–38 (Sotomayor, J., concurring in part, dissenting in part, and concurring in the judgment) (describing various anti-Mexican comments by President Trump and their connection to the DACA rescission).

293. *Id.* at 28.

294. *See id.* at 58 (Thomas, J., dissenting) ("[G]oing forward, when a rescinding agency inherits an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. . . . [T]he agency will be compelled to treat an invalid legislative rule as though it were legitimate.").

fail to follow statutory directives similarly undermines the rule of law values that provide agency accountability.[295] Moreover, even if the agency decisions stemming from these orders are invalidated, where the orders themselves are allowed to remain in place after escaping any sort of judicial review, they publicly signal the President's flouting of the rule of law. But courts are not strangers to evaluating similarly alarming, if not precisely the same, conduct. In particular, there are numerous times when courts have condemned government officials' conduct that gives rise to the appearance of corruption.

C. The Appearance of Corruption: The Dangers Public Perceptions of Presidential Lawmaking and Lawbreaking

Even the mere appearance of corruption threatens the operation of "fair and effective [democratic] government."[296] Appearances are critical in maintaining a governmental system in which power is derived from the support of "the People."[297] Thus, the appearance of good governance—or at least predictable, transparent, and justified governance—drives public trust, which is crucial to the continued stability of a democratic constitutional system.[298] Trust in the fairness and stability of the system not only drives participation in the electoral process but also compliance with laws themselves.[299]

In light of these concerns, courts and Congress have already established regimes to address the appearance of corruption.[300] Most of these mechanisms target corruption or the appearance of corruption in elections.[301] Elected officials are generally prohibited from quid pro quo or "dollars for votes"—or in the case of judicial officials, "dollars for decisions"—transactions.[302]

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295. *See id.* at 16.

296. Buckley v. Valeo, 424 U.S. 1, 27 (1976).

297. U.S. CONST. pmbl.

298. Robertson, Winkelman, Bergstrand & Modzelewski, *supra* note 23, at 378.

299. *Id.*

300. *See, e.g.*, 52 U.S.C.A. § 30125 (West 2002) (prohibiting candidates and elected federal officials from engaging in certain fundraising schemes); Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 883–87 (2009) (holding that an elected state supreme court justice was required to recuse himself from a case where he had received large campaign contributions from one of the litigants, resulting in an appearance of probable bias in violation of the Due Process Clause).

301. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–319 (2010); *Caperton*, 556 U.S. at 886; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 115 (2003).

302. *See, e.g.*, *Caperton*, 556 U.S. at 886 (West Virginia Supreme Court Justice acted unlawfully by failing to recuse himself from a case involving a company that had made major contributions to his campaign for judicial election).

Additionally, although the scope of the doctrine has narrowed over the years,[303] a number of Justices and scholars still recognize the grave importance of preventing the appearance of corruption in this democratic system.[304]

Suspect campaign donations have borne the brunt of judicial and congressional scrutiny, but the problems of apparent corruption also translate into other areas of law, including the administrative context. At least two cases have addressed inappropriate behavior by lower executive officials during the administrative process.[305] Such behaviors corrupted the agency decision-making process and ultimately led to agency actions being invalidated.[306]

For example, in *Western Watersheds Project v. Fish & Wildlife Service*, a court found that the FWS's decision declining to list the sage grouse as an endangered species was arbitrary and capricious under the APA.[307] Specifically, the FWS failed to make its decision based on "the best scientific and commercial data available," as required by statute.[308] The court reached this conclusion after reviewing the methods that the FWS used, which, strangely, did not include preparing a written record of the expert testimony it solicited.[309] Nor did it include asking the consulted experts whether the sage grouse should be listed as endangered or threatened.[310] Overall, the FWS's scant record made it impossible to determine if the agency had complied with mandatory procedures; instead, their preparation of the record and (mis)use of scientific, expert opinions indicated a procedure that violated the ESA and the APA.[311] The court also noted that a Deputy Assistant to the Secretary of the

303. *See Citizens United*, 558 U.S. at 357 (finding that the government's interest in legislating to prohibit the appearance of corruption beyond quid pro quo corruption in elections was not strong enough to overcome the legislation's chilling effects on speech).

304. *See id.* at 478–79 (Stevens, J., dissenting) (concluding that the majority has wrongfully disregarded prior case law and unduly narrowed the scope of the anti-corruption interest); Robertson, Winkelman, Bergstrand & Modzelewski, *supra* note 23, at 377.

305. *See* W. Watersheds Project v. Fish & Wildlife Serv., 535 F. Supp. 2d 1173, 1188–89 (D. Idaho 2007) (invalidating a decision not to list a species under the ESA based on incorrect procedures and undue influence of a DOI official); Ctr. for Biological Diversity v. Fish & Wildlife Serv., No. C04-04324, 2005 WL 2000928, at *1, *15 (N.D. Cal. Aug. 19, 2005) (vacating part of a listing rule under the ESA again based on irregular procedures influenced by the same DOI official).

306. *W. Watersheds Project*, 535 F. Supp. 2d at 1188–89 (decision not to list a species was arbitrary and capricious); *Ctr. for Biological Diversity*, 2005 WL 2000928, at *4, *13 (declaring a portion of a listing rule was arbitrary and capricious). *See also* Dep't of Com. v. New York, 139 S. Ct. 2551, 2274–76 (2019) (finding that the Secretary of Commerce failed to adequately justify the decision to add a citizenship question to the census).

307. 535 F. Supp. 2d at 1188–89.

308. 16 U.S.C.A. § 1533(b)(1)(A) (West 2018).

309. *W. Watersheds Project*, 535 F. Supp. 2d at 1183, 1184–1185.

310. *Id.* at 1181, 1185.

311. *Id.* at 1183–85.

Interior overseeing the FWS appeared to have manipulated agency processes in order to meet a "pre-ordained," politically motivated outcome.[312]

Deputy Assistant Julie MacDonald was charged with generally overseeing the FWS's processes.[313] MacDonald, seemingly seeking to implement certain policy preferences for economic development over conservation, directed the FWS staff to obscure and minimize scientific findings concerning the sage grouse's endangerment.[314] MacDonald even edited expert reports to create outcomes favorable to development and economic growth over environmental protections.[315] In light of MacDonald's blatant attempts to circumvent normal agency conventions for deciding whether to list a species as endangered or threatened, the court found that her involvement constituted an independent reason for finding the listing decision process arbitrary and capricious.[316] Overall, the court here recognized that corruption can infect the administrative decision-making process, resulting in invalid agency actions: MacDonald's corrupting influence led the agency to obfuscate its processes and explanations, thereby violating rule of law norms of predictability, transparency, and justification, as well as statutory provisions.[317]

MacDonald was a lower-ranking executive official, but the same logic on corruption and the rule of law applies to the President's orders to agencies. Although these orders, which provide for agency compliance only to the extent allowable by law, do not necessarily appear as blatantly corrupt as MacDonald's hands-on interference, they evoke similar concerns about whether agency decision-making is being unduly influenced by factors outside of their statutory purview.[318] More gravely, both evince a disregard for congressional directives in favor of unilaterally decided executive policy preferences.[319] In both scenarios, one person's political motivations drive

312. *Id.* at 1187–89.

313. *Id.* at 1187.

314. *Id.* at 1188.

315. *Id.*

316. *Id.* at 1188–89.

317. *Id.* at 1188 (finding that the record indicated that MacDonald bullied staff, improperly edited scientific reports, and ultimately "steer[ed] the 'best science' to a pre-ordained outcome.").

318. *Compare id.* at 1188 (describing MacDonald's "intimidation tactics" and defiance of statutory guidelines), *with* Second Amended Complaint, *supra* note 145, ¶ 5 (arguing that the two-for-one rule directs agencies "to engage in decisionmaking that is arbitrary, capricious, an abuse of discretion, and not in accordance with law.").

319. *See W. Watersheds Project*, 535 F. Supp. 2d at 1188 (finding that MacDonald sought to steer the U.S. FWS to a "pre-ordained outcome" not to list the species, likely due to political interests in land development); Second Amended Complaint, *supra* note 145, ¶ 6 ("Rulemaking in compliance with the Executive Order's requirements cannot be undertaken without violating that statutes from which the agencies derive their rulemaking authority and the Administrative Procedure Act (APA).").

agencies to disregard mandatory procedures, circumventing the safeguards that Congress and the courts have established to prevent such arbitrary, factually unsound decision-making.

But there are also key differences between the President's orders and MacDonald's behind-the-scenes tampering. Notably, the President's executive orders are open for the public to see, while MacDonald's conduct only came to light because of a whistleblower inside the FWS.[320] Thus, rather than engaging in clandestine agency espionage, the President announced his disregard for Congress for all to hear. Even more importantly, the President is the President. A lower-level official, such as MacDonald, behaving inappropriately is certainly alarming, but her purview is much narrower and her influence more confined than that of the Commander in Chief. Further, courts are much more likely to hold lower-ranking officials accountable for their unlawful conduct.[321] They are far less likely to take the same measures to hold the President accountable.[322]

In other words, MacDonald's conduct was clearly inappropriate (even illegal) in its effect on the FWS's decision-making process, which was statutorily obligated to rely on only certain criteria. Meanwhile, a President issuing an executive order purportedly conforms to conventional standards for the rule of law.[323] Further, the public may not become aware of the subordinate's misconduct. If they do, courts can correct or at least note its illegality.[324] Conversely, the public is much more likely to bear witness to presidential agency directives that contravene congressional directives, while courts are less likely to rebuke a President. In fact, courts have at times deemed themselves incapable of doing so.[325]

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320. *See W. Watersheds Project*, 535 F. Supp. 2d at 1188 (describing email correspondence provided to the court demonstrating MacDonald's tactics).

321. *See* Siegel, *supra* note 11, at 1624–25.

322. *See id.* at 1620 ("[I]mportant governmental actions, if taken by the President, may escape the judicial review to which they would routinely be subject if they were taken by lesser officials."); *see also* Trump v. Haw., 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting) (characterizing the majority opinion as ignoring the Anti-Muslim remarks from the President that led to the Travel Ban).

323. *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (purporting to conform with applicable laws).

324. *See League I*, 303 F. Supp. 3d 985, 995, 1001 (D. Alaska 2018) (noting that although a court may lack power to enjoin a president, the plaintiffs could show standing and redressability because the court did have the power to enjoin lower federal officials if necessary); *W. Watersheds Project*, 535 F. Supp. 2d at 1188–89 (invalidating a decision not to list the sage grouse under the ESA as arbitrary and capricious in part due to undue influence by a DOI official).

325. *See League I*, 303 F. Supp. 3d at 995; *see also* Franklin v. Mass., 505 U.S. 788, 826 (1992) (Scalia, J., concurring in part and concurring in judgment) ("We have long recognized that the scope

In this way, executive orders, executed under the color of legality, are even more troubling than the scurrilous acts of isolated subordinate officials; they purport to conform to legal and democratic norms but seek to circumvent congressional directives.[326] They attempt to displace valid agency processes, provided by constitutionally passed legislation, in favor of unilaterally decided policy preferences. In doing so, they violate rule of law norms and threaten legitimacy in the same way as elected officials who accept bribes for votes.[327] The President's directives here create at least the perception of attempting to thwart Congress and redirect agencies toward unilaterally decided aims.[328] Agencies, in turn, appear to make their decisions based on these directives rather than on the factors Congress provided in the APA and other statutes. This subversion of fair and delineated procedures then leads to unpredictable and otherwise unjustifiable results.[329] Moreover, when agencies attempt to justify their results, the processes they actually employed remain suspect, tainted by the President's orders.[330]

In other words, these presidential directives, rather than a mere exercise of executive authority, undermine Congress; by undermining Congress, these orders also undermine procedures that help agencies comply with rule of law principles. And by doing all of this publicly, the President sends a message that his will is more important than that of Congress—and if the President's will is superior to Congress's legislation, then the President becomes elevated above the bounds of the law and the Constitution. These orders thus signify a troubling turn of events. Aside from demonstrating the tensions between the President, Congress, and administrative agencies, these orders show open contempt for our constitutional, democratic system. This contempt, and the rule of law implications that it brings to bear, are particularly troubling in a time

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of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers."); Siegel, *supra* note 11, at 1620 (describing the Supreme Court's self-imposed limits on jurisdiction over suits against the President).

326. *Compare* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (directing agencies to designate two regulations for repeal based on each new regulation imposed and to offset costs), *with* 42 U.S.C.A. § 7409(b) (West 2012) (directing the EPA to set air quality standards based on public health), *and* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468–71 (2001) (holding that the Clean Air Act prohibits the EPA from considering costs when setting national air quality standards).

327. *See infra* Parts IV.A., IV.C.

328. *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

329. *See* Second Amended Complaint, *supra* note 145, ¶¶ 1–5 (alleging that Executive Order No. 13,771 has led to various unlawful agency actions).

330. *See* Pub. Citizen, Inc. v. Trump, 361 F. Supp. 3d 60, 83–91 (finding that the plaintiffs could not conclusively show that the challenged order had delayed regulations as a matter of law where the agencies could present alternative or additional explanations).

where the American people have all but lost faith in their government.[331] As a government by and for the people, a blow to public trust and confidence in a representative, democratic system is a blow to that system's very legitimacy.

These grave concerns support applying analogous reasoning to the President's actions that courts applied to the actions of lower-level officials like MacDonald. But this cannot happen so long as plaintiffs are unable to obtain meaningful judicial review of such corrupting orders. Notably, the plaintiffs in *Western Watersheds* were only able to obtain judicial review due to the seemingly relaxed application of standing that plaintiffs in procedural rights cases enjoy. The mere fact that the plaintiffs submitted comments during the agency's notice-and-comment process sufficed to guarantee them standing;[332] such an approach differs from typical standing requirements.[333] Therefore, in order to have some hope of combating the dangers of purely policy-driven, anti-factual presidential directives contrary to Congress, we must lower the barriers that plaintiffs face in obtaining judicial review. As noted, the most significant of such barriers is that of standing. Thus, the final Part of this Article proposes a sort of relaxed standing that would allow plaintiffs access to judicial review and subsequently allow courts to fairly adjudicate these troubling orders.

IV. THE ROLE OF COURTS IN COUNTERING UNCONSTITUTIONAL PRESIDENTIAL DIRECTIVES

The previous Parts addressed agency directives contrary to congressional directives and the problems that they cause.[334] Specifically, executive orders that appear to contravene the Constitution and the laws of the United States, such as the APA and various agency enabling acts, pose grave concerns for maintaining the rule of law, and by extension, legitimate governance.[335] Sometimes these orders operate under a cloak of legitimacy, allowing them to escape review unscathed.[336] At the very least, many recent executive orders—dubious in legality—have compelled agencies to act in certain ways that may contravene their statutory duties. Yet, agencies may justify their actions using

331. *See supra* Part III.A.

332. W. Watersheds Project v. Fish & Wildlife Serv., 535 F. Supp. 2d 1173, 1183 (D. Idaho 2007).

333. *See, e.g.*, *League I*, 303 F. Supp. 3d 985, 995–96 (D. Alaska 2018) (applying the typical standing analysis factors of injury-in-fact, traceability, and redressability to the plaintiffs' challenge to Executive Order No. 13,795); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (laying out the "irreducible" standing factors of injury-in-fact, fairly traceable causation, and redressability).

334. *See supra* Parts II, III.

335. *See supra* Part III.B.

336. *See supra* Part II.B.; *see supra* note 182 and accompanying text.

alternative rationales.[337] In short, the nature of the orders and their effects on administrative agencies contravene important rule of law principles, most notably justification and transparency in law.[338]

Justification and transparency, though distinct principles, target the same idea, particularly in the administrative context: What are agencies doing, and why are they doing it? Executive orders like the two-for-one rule frustrate such an analysis by making it unclear whether an agency deregulated based on the executive order or its own independently and expertly reasoned decision-making.[339] This murky reasoning and its contravention of the goals of transparent and justified lawmaking stain the public image of government. The President apparently need not accept existing legislation, and because of his command over executive agencies, such agencies can flout Congress's will by either failing to follow the requisite factors in their decision-making or offering post hoc explanations for politically driven actions.

What can be done about these concerning developments? As discussed in Part II, standing frequently proves a difficult hurdle for plaintiffs to overcome. Thus, one solution is to relax standing rules for the plaintiffs in these cases. Of course, it must be determined to what extent standing can be relaxed given that it is a constitutional requirement.[340] And even if courts relax standing requirements, that may not necessarily mean that they will invalidate the orders in the way that plaintiffs seek. Still, some solution, even an imperfect one, is better than no solution. Moreover, even if orders are not always invalidated, the fact that plaintiffs have a chance of judicial review may help decrease the appearance of corruption that these orders create and increase rule of law values like transparency and justification.

A. The Standing Solution

To have standing to sue, a plaintiff must show that she has suffered an injury-in-fact, caused by defendant's conduct, and that a court can redress this injury.[341] But courts, including the Supreme Court, do not always apply these requirements uniformly across all cases and areas of law.[342] Even in the

337. *See supra* note 268 and accompanying text.

338. *See supra* Part III.B.

339. *See supra* Part II.B.i.

340. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (describing standing's requirements of injury, causation, and redressability as an "irreducible constitutional minimum").

341. *See id.* at 560–61.

342. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 187 (2012) ("Despite the oft-repeated orthodoxy that injury-in-fact, causation, and redressability are required by Article III, federal courts have tolerated congressional relaxation or elimination of these 'constitutional minima' in multiple lines of precedent.").

landmark standing case, *Lujan v. Defenders of Wildlife*,[343] where the environmental plaintiffs were found not to have standing, the Court conceded that a plaintiff asserting a procedural right "can assert that right without meeting all the normal standards for redressability and immediacy."[344] Other environmental administrative law cases have echoed these sentiments. In *Massachusetts v. EPA*, for example, the majority found that Massachusetts had standing to challenge the EPA's failure to regulate greenhouse gas emission from new vehicles based on fears of coastal land losses due to climate change.[345] Moreover, Massachusetts had standing despite the fact that even if the EPA was compelled to regulate greenhouse gas emissions from new vehicles, it might still lose coastal land because of other countries' failure to combat climate change.[346]

Of course, the Court's decision in *Massachusetts v. EPA* does not erase the language in other cases deeming strict standing requirements mandated by Article III's Case or Controversy Clause.[347] On the other hand, as other scholars have argued, the seemingly different treatment of standing in these cases might make sense if one accepts that the Case or Controversy Clause actually means different things in different cases.[348] That is, what constitutes a proper case or controversy depends on the context.[349] Where certain statutes confer procedural rights, then a plaintiff's claim can survive pursuant to the right-granting statute, even if it otherwise does not accord with the typically stringent standing requirements.[350] Thus, a plaintiff has a case if she falls within the statute's intended "zone of interests," even where her claim arguably fails to meet normal standing requirements.[351]

Congress itself never specified that these statutes should be construed as requiring a different interpretation of Article III, nor has it amended the Constitution to further clarify procedural rights standing. Instead, the relaxation of standing requirements in procedural rights cases comes purely from judicial interpretation.[352] So what is to say that this line of case law cannot expand to include challenges to contrarian executive orders directing agencies?

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343. *See generally Lujan*, 504 U.S. at 555.

344. 504 U.S. at 572 n.7; *see also* Mass. v. EPA, 549 U.S. 497 (2007).

345. *Mass*., 549 U.S. at 526.

346. *See id.* at 542–43 (Roberts, J., dissenting) (arguing that too many other factors outside of EPA or court control contributed to potential coastal land losses for the plaintiffs to have standing).

347. *See* U.S. CONST. art. III, § 2, cl. 1.; *Lujan*, 504 U.S. at 560–61.

348. *See, e.g.*, Lee & Ellis, *supra* note 342, at 227.

349. *Id.*

350. *Id.*

351. *Id.*

352. *See id.*

Moreover, the cases in which the Supreme Court has conceded a relaxed standing doctrine have much in common with the challenges to executive orders examined in this essay. Procedural rights cases, such as National Environmental Policy Act (NEPA) challenges, are given leeway in passing standing requirements due to the important procedural rights at stake—specifically, the right to have agencies adequately justify and make transparent their decision-making.[353] Those, really, are the key goals of procedural rights cases, as plaintiffs want the agencies to re-do their processes in accordance with statutorily set processes, and through doing so, hopefully achieve a better outcome.[354] The only difference in challenges to executive orders is that such challenges seek to attack the process-obfuscating document itself, rather than focusing purely on those carrying it out.

In other words, challenges to executive orders directing agencies not to act in accordance with law target the cause of unlawful agency action, rather than merely targeting the symptoms as discussed previously. And, as noted above, these challenges—if accepted by courts—would help to directly address the growing perception of corruption in agency behavior and degradation of political norms between the Executive and Legislative branches.[355] As such, it appears that relaxing standing requirements, or perhaps simply interpreting them more similarly to procedural rights cases, could help resolve some of the issues this Article identifies concerning executive orders contrary to law. The next step, then, is to determine precisely how standing requirements should be treated in these cases.

One possible solution would be for courts to apply a looser interpretation of standing requirements in all cases challenging executive orders directing agency action. As in NEPA cases, once a plaintiff demonstrates an injury-in-fact, the causation and redressability requirements could be relaxed so as to allow these challengers their day in court.[356] Thus, the first option to explore is relaxing the injury-in-fact requirement. Scholars, such as Professor Cass Sunstein and Professor Martin Redish, have noted that the individual injury-in-

353. *See, e.g.*, Habitat Educ. Ctr., Inc. v. United States Forest Serv., 673 F.3d 518, 527 (7th Cir. 2012) (explaining that although NEPA does not require any particular result, it ensures agencies follow a process through which they assess environmental concerns of their actions and respond to comments about them).

354. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting that requiring an agency to follow a specific process and take environmental concerns into account is "almost certain to affect the agency's substantive decision").

355. *See supra* Part III.C.

356. *See supra* Part II.B.

fact requirement may not be constitutionally required nor wise.[357] After all, the Constitution itself contains no provision prohibiting generalized grievances—it is the Supreme Court's interpretation of Article III that defines injuries as particularized, concrete, and individualized.[358] Still, even if plaintiffs survive the injury requirement, they must also demonstrate sufficient causation and redressability.[359]

Plaintiffs challenging executive orders directing agency action may struggle to demonstrate that their injury is directly attributable, or "fairly traceable," to the order itself, particularly where the injury is grounded in an agency's action or inaction.[360] Agencies reportedly rely on a multitude of factors in their decision-making process.[361] It is all too easy for an agency to deny their reliance on an executive order's direction, thereby weakening plaintiffs' causation argument.[362]

But executive directives are issued for just that purpose—to cause agencies to act in certain ways. Although agencies might not always rely on these orders in making their decisions, they have a tremendous incentive to do so. The agencies affected by these orders are executive agencies, the most vulnerable to the whims of the President, due to his power to remove their heads at will. President Trump has notoriously fired numerous officials for failing to advance his policies,[363] often replacing them with "acting heads" unconfirmed by the

357. *See* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 616 (1999) (arguing that generalized grievances may be actionable, particularly with congressional authorization); Martin H. Redish, *The Passive Virtues, the Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 654–75 (1990) (deconstructing various rationales for the injury-in-fact requirement and arguing for a model that accounts for the judiciary's role in checking the other branches).

358. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013). *But see* Redish, *supra* note 357, at 670 (noting that the individualized injury-in-fact requirement does not further the Court's role as a coequal, political branch).

359. *See* Pub. Citizen, Inc. v. Trump, 361 F. Supp. 3d 60, 85 (finding that although the plaintiffs could show sufficient injury due to the agency actions delayed by the two-for-one rule, they could not show causation or redressability "beyond genuine dispute.").

360. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

361. *See, e.g.*, *Pub. Citizen, Inc.*, 361 F. Supp. 3d at 86 (citing multiple potential bases for decisions not to regulate).

362. *See id.* at 65 (finding that although the plaintiffs could plausibly allege the standing requirements to survive summary judgment, they could not prove standing as a matter of law, particularly due to the unclear causal connection between the executive order and the agencies' deregulation).

363. *See generally* Jan Diehm, Sam Petulla, & Zachary B. Wolf, *Who Has Left Trump's Administration?*, CNN (Oct. 21, 2019), https://www.cnn.com/interactive/2017/08/politics/trump-admin-departures-trnd [https://perma.cc/E3AB-RNBD] (noting that eighteen former cabinet members and agency heads have been terminated, seven have departed for "unknown" reasons, and another forty have "resigned").

Senate.[364] It is unclear why courts should ignore (or at the very least, fail to account for) the very real possibility that such agencies are induced to act by the President's orders and his removal power. This power balance incentivizes agencies not only to follow presidential demands but also to avoid referring to such demands in their administrative record in order to avoid drawing further attention to the President's order.

To combat such deceptive practices, courts could apply a presumption of causation; again, the President would not have issued this executive order if he did not think that agencies would follow it. Even without a presumption, courts could still apply a more relaxed understanding of causation, just as in procedural rights cases. In NEPA cases, for example, plaintiffs can have standing to bring a claim against an agency for failure to file an Environmental Impact Statement, even though there may be some attenuation between this failure and a plaintiff's actual alleged injury.[365] Here, the link between injury and causation might be even more direct based on the President's clear influence over executive agencies through his mandates.

As for the redressability requirement, there is always the argument that even if a court invalidates an executive order, the agency still might not do what plaintiffs want. This may be particularly true given the President's influence on agencies; if his public order is stricken, he can still informally influence agencies in secret, especially given his removal power. This argument, however, ignores the potency of the public nature of the order. The public nature gives rise to the appearance of corruption within the agency's decision-making process.[366] Such a perception is all the more troubling given the current climate, with Americans increasingly believing the government consists of bad actors making decisions without regard to the public, while making decisions in pursuit of the public benefit is precisely what administrative agencies were created to do.[367] Thus, perceived corruption is troubling in the administrative

364. Aaron Blake, *Trump's Government Full of Temps*, WASH. POST (Feb. 21, 2020, 5:30 AM), https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days/ [https://perma.cc/YX4U-6V7C]. Temporary appointments of acting heads are lawful but restricted by the Federal Vacancies Reform Act (FVRA). *See* 5 U.S.C.A. § 3345(a)(3) (West 2018); *see also* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017) (holding that the FVRA prevents all nominees for a permanent agency position from holding that position in a temporary capacity prior to confirmation).

365. Lee & Ellis, *supra* note 342, at 172.

366. *See supra* Part III.C (commenting on the appearance of corruption in agency decision-making).

367. *See* 42 U.S.C.A. § 7409(b) (West 2018) (directing the EPA to set national air quality standards in accordance with the public welfare); 33 U.S.C.A. § 1252(a) (West 2018) (directing the EPA to develop programs to decrease or end water pollution for public benefit); 16 U.S.C.A. §§ 1531,

context where agencies increasingly carry the load of regulating private behavior.[368]

Further still, even if the agency reaches the same, potentially problematic decision after a court-mandated review, plaintiffs can still bring an APA challenge. Despite the President's influence and preferences, the agency must justify its decision under the APA, and if the agency again fails to provide sufficient justification, the agency will be forced to revisit its decision again. This does not guarantee that the agency will reach plaintiffs' desired outcome, but that is true of all challenges to agency action.[369] These challenges are not about allowing plaintiffs to make up regulations as they desire; they are about ensuring agencies follow legally mandated procedures. Such challenges strike at both the substance and the process of agency decisions and are vital in preserving the rule of law in the administrative context. Thus, even if the agency never reaches the desired decision, plaintiffs have still achieved an important goal: ensuring transparent and justified agency decision-making.

And again, courts already apply a more relaxed version of the redressability requirement in procedural rights cases. In NEPA cases, there is no guarantee that forcing the agency to file an Environmental Impact Statement will result in the challengers' desired outcome, yet courts still allow such challenges.[370] In both NEPA and other procedural rights cases, agencies are required to follow congressionally mandated procedures, whether they want to or not, to maintain rule of law principles. And they remain obligated to follow these procedures even if the President does not want them to. Thus, the same rule of law interests in NEPA cases are at play here as well, and the same relaxed approach to standing should likewise apply.

One might argue that this approach reaches beyond its intended target. Subjecting all presidential administration orders to relaxed standing could significantly increase litigation that would otherwise be considered frivolous, clogging courts and preventing agencies from carrying out even their valid

1533(b) (West 2018) (providing for the FWS to make decisions to list endangered or threatened species based on the best scientific and commercial data available, in accordance with the ESA's policy of promoting conservation of wildlife and ecosystems).

368. *See* Fallon, *supra* note 231, at 4.

369. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting that agency decision-making is likely to be affected by procedural requirements but that these procedural requirements do not dictate specific results).

370. Lee & Ellis, *supra* note 342, at 172.

procedures. Ossification due to litigation against administrative agencies is already a concern.[371]

Nevertheless, it is not clear that fear of too much litigation justifies cabining judicial review of unlawful orders. As a preliminary matter, it is not certain that so many plaintiffs would benefit from relaxed standing as to allow such an onslaught of litigation; plaintiffs would still have to overcome the standing barriers used in normal procedural rights cases.[372] Further, any fear of ossification is somewhat undercut by the evidence of Presidents' abilities to directly influence and control agencies and their actions. Indeed, as this Article argues, dramatic policy vacillations, rather than agency stalemate, present more of a concern for rule of law principles.[373] Agencies subject to unlimited presidential administration characterized by policy-driven, rather than expertise-driven, rationale are anything but predictable.[374] And decisions that are justified by less-than-accurate or post hoc reasoning are not transparent or truly justified under our current legal regimes.[375]

Perhaps a stronger argument is one concerning the constitutionality of relaxed standing in general. If the standing requirements laid out in *Lujan* are truly an "irreducible constitutional minimum,"[376] then should courts be allowed to apply a more relaxed version of this test? An obvious answer to this question lies within Justice Scalia's opinion in *Lujan*, where he wrote of standing as a constitutional requirement, and, in a footnote, noted that standing works differently in procedural rights cases.[377]

This argument taps into even graver concerns about the roles of the Executive and Judicial branches with regard to administrative agencies. Numerous scholars have argued that the President should enjoy extensive directive authority over administrative agencies, with some scholars extending this authority even to independent agencies, which are somewhat isolated from presidential control.[378] Absent presidential control, administrative agencies

371. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 247–48 (2001) (Scalia, J., dissenting) (criticizing the majority's less deferential approach to agency decision-making as likely to result in ossification).

372. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 572 n.7, 573–74 (1992) (noting that even though procedural rights cases are "special," plaintiffs still bear the burden of establishing standing to challenge an agency's failure to comply with procedural requirements).

373. *See supra* Parts II.A.ii., III.B.

374. *See supra* Part III.B.

375. *Id.*

376. *Lujan*, 504 U.S. at 560.

377. *Id.* at 572 n.7; *see also* Sunstein, *supra* note 357, at 616 (arguing that Congress can overcome traditional standing requirements through legislation).

378. *See supra* notes 40, 41, 42, 43, 44 and accompanying text.

exist as an unelected, unaccountable, "headless fourth branch."[379] Such a branch is not clearly contemplated in the Constitution.[380] Additionally, scholars have noted the problematic nature of Congress's purported delegations to these agencies;[381] the Constitution does say that all legislative power is vested in Congress.[382]

These critiques certainly have at least text-based merit. Nonetheless, it seems somewhat unlikely that courts or Congress will wholeheartedly embrace such an approach anytime soon.[383] Doing so would essentially require a total reworking or even destruction of the administrative state as we know it. Whether or not this is a desirable outcome, it seems exceedingly unlikely such an approach would be embraced given the tremendous role that administrative agencies currently play in regulating private behavior. From a normative perspective, agencies that consist of experts or other specialized decision-makers are much better positioned to make rules about specific areas than Congress, particularly where Congress behaves in an especially partisan way by enacting legislation (if at all) at a snail's pace.[384]

Additionally, Congress's role in all of this presents another conundrum. Scholars, such as Professor Sunstein, have argued that Congress can overcome the typical barriers to standing through legislation granting procedural rights.[385] Moreover, it may seem problematic to allocate responsibility for deciding who may access courts to the Judiciary, rather than the Legislature, which was vested with power over federal jurisdiction.[386] The federal Judiciary has been considered to center a "private rights model," meaning federal courts exist to

379. *See generally* Calabresi & Prakash, *supra* note 44, at 663.

380. *See id.*

381. *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330–31 (2002) (describing various scholarly arguments about the existence and application of the nondelegation doctrine despite the Supreme Court's general rejection of it); *see also* Gundy v. United States, 139 S. Ct. 2116, 2133–42 (2019) (Gorsuch, J., dissenting) (arguing for applying the nondelegation doctrine). *But see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing against the acceptance and application of the nondelegation doctrine to the modern administrative law context).

382. U.S. CONST. art. I.

383. *See, e.g.*, *Gundy*, 139 S. Ct. at 2129–30 (2019) (refusing to reinvigorate the nondelegation doctrine to invalidate legislation).

384. *See, e.g.*, Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991, 992 (2014) (writing that legislative impasses indicate "a deep tension between the responsibility of Congress to make laws for the people and its function of providing checks and balances" in accordance with the Constitution).

385. *See* Sunstein, *supra* note 357, at 616.

386. *Id.* at 637.

litigate private disputes, not solve general, political issues common to all Americans.[387] The response to this argument is more or less pragmatic in nature. As of late, Congress has largely abdicated its responsibility to check presidential power.[388] Although Congress can overcome traditional standing barriers through legislation, it has no incentive or even ability to do so when the same party controls the Presidency and at least one branch of Congress. Thus, though it may be preferable for Congress to counter presidential administration, rather than having an unaccountable, unelected judiciary do so, the recent behavior of Congress indicates that this is an unlikely outcome.[389] Courts must fill this checks-and-balances void.

Short of the consensus needed to enact legislation, members of Congress recently attempted to challenge presidential misconduct another way. In *Blumenthal v. Trump*,[390] twenty-nine Senators and one hundred eighty-six members of the House of Representatives sued to challenge President Trump's alleged violations of the Emoluments Clause, which forbids government officials from accepting gifts from foreign nations without the consent of Congress.[391] But as the Court of Appeals for the District of Columbia Circuit wrote, since these members of Congress were asking the court to intervene in a dispute between two branches of government and declare the actions of one unconstitutional, heightened scrutiny applied to the standing determination; this

387. *See* Redish, *supra* note 357, 651–54 (describing the "private rights model" of judicial review).

388. *See* Devins & Fisher, *supra* note 16, at 83 (describing how, rather than checking a President acting beyond his Constitutional authority, oftentimes "Congress has let power slip through its fingers."). Additionally, even when members of Congress believe that the President has exceeded his legal authority, Congress has often failed to condemn or even ratified the President's controversial actions. The National Monuments context provides one example; even where federal and state lawmakers have criticized Presidents for their designations (or purported revocations) of national monuments, they have failed to act to counter these decisions. *See, e.g.*, Noah Greenstein, Note, *America's Big League National Monuments: Can President Trump Make them Smaller?*, 43 VT. L. REV. 153, 176–77 (2018) (describing widespread criticism of President Clinton's national monument creation, which Congress nonetheless accepted); *id.* at 179–80 (describing President Trump's revocation of President Obama's monument designation of Bears Ears and ensuing lawsuits, with no congressional action in sight). Indeed, scholars have noted Congress's history of general "acquiescence" to Presidents' designations of National Monuments, even where they are controversial. *Id.* at 184; *see also* James R. Rasband, *Stroke of the Pen, Law of the Land?*, 63 ROCKY MTN. MIN. L. INST. 21, 21–25 (2017).

389. *See* Sunstein, *supra* note 357, at 637. Of course, there is no guarantee that such separation of powers concerns would vanish by waiting for Congress to provide for such procedural rights. *See* Federal Elections Comm'n v. Akins, 524 U.S. 11, 30 (1998) (Scalia, J., dissenting) (expressing concern over the aggrandizement of the judiciary at the expense of the executive by allowing Congress to lower standing barriers, thereby granting jurisdiction over cases too close to generalized grievances).

390. 949 F.3d 14, 20 (D.C. Cir. 2020).

391. *See* U.S. CONST. art. I, § 9, cl. 8.

heightened scrutiny is yet another barrier that prevents courts from wading into political disputes.[392] Because the suit was predicated on a loss of political power to all of Congress, rather than a particularized, private injury, the court dismissed the lawmakers' claims for lack of standing.[393] It appears that absent a majority, members of Congress may actually be worse off when challenging unlawful presidential action than ordinary citizens because of this heightened level of scrutiny that applies to disputes between political branches.

In sum, the administrative state is not likely to go away anytime soon, and Congress is increasingly unlikely (or unable) to address presidential malfeasance on its own. As such, this Article attempts to make the best of the situation as it currently exists. The solutions it proposes are not perfect, but they are solutions that could be realized using the sort of reasoning that courts already apply in similar areas of law. Failing a total reworking of the administrative state, perhaps the best option is to (re)introduce checks and balances into the current system in accordance with those checks and balances that the Constitution does inherently provide for.

B. What About the Merits?

Even if it becomes easier to challenge executive orders, that by no means guarantees that they will win, especially given courts' hesitancy to question presidential actions. Courts provide varying rationales for this hesitancy, ranging from separation of powers concerns to the plain text of the APA, which does not clearly categorize the President as an agency (or otherwise subject to its requirements).[394] In other cases, this hesitancy is not explained outright but becomes clear in other ways. Courts' hesitancy to acknowledge and rebuke pretextual presidential decisions is evidenced in *Trump v. Hawaii*, better known as the Travel Ban Case.[395]

In the Travel Ban Case specifically, a dissenting Justice Sotomayor criticized the majority's refusal to fully address the President's anti-Muslim

392. *Blumenthal*, 949 F.3d. at 20. The political question doctrine is another example of courts' refusal to meddle between the political branches. *See* United States v. Munoz-Flores, 495 U.S. 385, 394 (1990) ("[T]he political question doctrine . . . is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government.").

393. *Blumenthal*, 949 F.3d at 20–21.

394. *See, e.g.*, Franklin v. Mass., 505 U.S. 788, 800–01 (1992) ("The President is not explicitly excluded from the APA's purview, but . . . [o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the . . . APA.").

395. 138 S. Ct. 2392, 2423 (2018).

comments, which directly preceded an early version of the Travel Ban policy.[396] The President's proclamation restricting entries from certain countries was made pursuant to an existing statutory scheme, rather than as a matter of purely presidential administration.[397] Still, the proclamation's justification was muddled. Executive Branch officials stated the decision was based on a "risk assessment" that analyzed which countries had "deficient" information sharing practices.[398] Executive officials first reached out to these countries' governments to see if an understanding could be reached in order to improve the flow of information and decrease security concerns, but no such agreement occurred.[399] Instead, the officials recommended entry restrictions for nearly all of the countries identified, resulting in the travel ban.[400]

On the contrary, most critics, including Justice Sotomayor, saw the ban as directly attributable to President Trump's campaign promise of a "total and complete shutdown of Muslims entering the United States."[401] The President himself later stated that his "Muslim ban" plan had been converted into an "extreme vetting" system but was still rooted in the original anti-Muslim motivation.[402] But as executive officials—and the majority of the Supreme Court—would have it, these statements of animus and the imposition of a travel ban targeting countries with large Muslim populations were unrelated.[403]

Contrary to the majority, Justice Sotomayor's dissent points to numerous speeches, tweets, and other incidents where the President evinced the anti-Muslim sentiments behind the travel ban.[404] She further noted that the

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396. Justice Sotomayor noted that the majority's "highly abridged account" of the President's Islamophobic remarks failed to "tell even half of the story." *Id.* at 2435 (Sotomayor, J., dissenting).

397. *Id.* at 2408–09; *see also* 8 U.S.C. §§ 1152(a)(1)(A), 1182(f) (allowing the President to set certain restrictions on foreign entry into the United States).

398. *See Haw.*, 138 S. Ct. at 2404–08 (describing the DHS and the Presidents' decision-making process).

399. *See id.* at 2405 (the State Department made diplomatic efforts to prompt the at-risk countries to bring their standards up to par).

400. *See id.* at 2405–06 (describing the Proclamation's provisions restricting entry).

401. *Id.* at 2435 (Sotomayor, J., dissenting).

402. *See id.* at 2436.

403. *Id.* at 2418.

404. *See id.* at 2433, 2435–39.

> Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

Id. at 2440.

Government (and the majority) seemed content to brush these statements under a very large rug rather than acknowledge them.[405] And the majority's review of the statute in light of other countries' travel restrictions "d[id] little to break the clear connection between the Proclamation and the President's anti-Muslim statements."[406] The Court thus allowed the President to hide his true motivations behind administrative review, which provides for some deference to agencies and reliance upon the administrative record.[407]

In the Travel Ban Case, the plaintiffs were at least able to get into court based on the ban's clearly injurious effects. Yet they ultimately found no relief. In other cases, even where the court accepts that the President may have acted contrary to law, plaintiffs have been denied relief based on the court's inability to grant certain forms of relief against a sitting President.[408]

Such considerations may lead to the conclusion that while relaxing standing requirements presents one possible solution, it cannot be the only one; even if plaintiffs can get into court and stay there, is there a point if a court refuses to stand against the President? Such a conundrum could be seen as an indictment of courts' political calculus, which leads courts to refuse to address executive misdeeds for fear of not being obeyed and losing even more legitimacy.[409]

But there is evidence that the current situation is not hopeless. In *League of Conservation Voters v. Trump* (*League II*), for example, a district court did invalidate part of an executive order that was unlawful, despite the Government's arguments that the court could not issue relief against the President.[410] The Supreme Court and lower courts have also invalidated presidential directives in other cases; a court need not enjoin the President in order to redress injuries caused by his order.[411]

As such, there is some reason to believe that a court would be able to resolve a challenge to a presidential directive to agencies in plaintiffs' favor. Additionally, we have not yet truly tried this approach to adjudicating

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405. *See id.* at 2441 ("[T]he Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review." (citation omitted)).

406. *Id.* at 2443.

407. *Id.*

408. *See* Siegel, *supra* note 11, at 1620 (describing the Supreme Court's general opposition to issuing relief against a sitting president).

409. *See id.* at 1687 (describing the fear of executive disobedience).

410. 363 F. Supp. 3d 1013, 1031 (D. Alaska 2019).

411. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 568, 635 (2006) (overturning a former President Bush directive); Youngstown Steel & Tube v. Sawyer, 343 U.S. 579, 587 (1952) (overturning a former President Truman executive order); Chamber of Com. v. Reich, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (overturning a former President Clinton executive order).

challenges to questionable executive orders. Justice Kagan, the architect of much modern understanding of presidential administration, contemplated judicial review as a possible solution to the seemingly limitless expanses of presidential direction of agencies.[412] There must be at least some room for courts in this context. This is particularly true given the threats posed by increasingly powerful and problematic orders—threats to the rule of law that give rise to the appearance of corruption.

C. Some Final Thoughts: The Importance of Addressing Problematic Executive Orders

The standing solution this Article provides is not perfect. Although courts have relaxed standing requirements in other areas of law, this does not guarantee that they will be willing to do so in cases challenging executive orders, particularly where courts have previously expressed concerns about rebuking the President. There is likewise no guarantee that the merits of these challenges will ultimately be resolved in plaintiffs' favor. Ultimately, then, what this Article hopes to do is work toward deciding how to handle these contrarian presidential directives to agencies.

Some might say that the Legislative—rather than the Judicial—branch should act to check the President here.[413] But Congress is frequently in no position to counter presidential administration run amok; it is debilitated by polarization that incentivizes politicians to put political goals before constitutional requirements. The public has noticed that Congress places constitutional concerns on the backburner in order to advance certain policy goals.[414] But this does not mean that courts are required to do the same.

Instead, courts can and should follow their constitutional mandate of exercising authority over cases and controversies, especially where to avoid doing so spells trouble for separation of powers principles. Moreover, some courts already are doing this.[415] With Congress out of action, courts remain the

412. Kagan, *supra* note 29, at 2253, 2372.

413. *See* Hessick & Marshall, *supra* note 206, at 86–88 (describing how presidential power has expanded absent congressional checks); *see also* Sunstein, *supra* note 357, at 616 (describing Congress's ability to relax standing through procedural rights statutes).

414. *See generally* Hessick & Marshall, *supra* note 206, at 88 (describing how members of Congress typically see their chief goal as furthering their parties' policies rather than fulfilling certain constitutional checks and balances). *See also Congress and the Public*, GALLUP (Jan. 26, 2020), https://news.gallup.com/poll/1600/congress-public.aspx [https://perma.cc/2UT5-K3AT] (finding that as of 2015, approximately 68% of Americans disapproved of Congress).

415. *See League II*, 363 F. Supp. 3d 1013, 1030–31 (D. Alaska 2019) (vacating the President's executive order to the extent is exceeded his authority under OCSLA and the Constitution).

best hope to quell the rising tide of public distrust of government and the appearance of corruption at all its levels.[416] We do not argue that courts should exceed the bounds of their constitutional authority, such as by taking cases grounded solely in vague, generalized grievances against a President's policies, but instead that the standards that apply in many procedural rights cases should also apply in cases challenging unlawful presidential administration.[417] Courts are already addressing the rule of law concerns—specifically transparency and justification in regulation—that animate challenges to problematic executive orders directing agency action. Thus, one workable, if not flawless, solution to the constitutional problems and seemingly corrupt nature of these orders is to expand this more relaxed interpretation of standing requirements to the challenges to these polemical orders.

How would the relaxed-standing solution work in practice? Let us briefly revisit the hypothetical posed at the beginning of this Article. In this scenario, the President issued an executive order directing the FWS not to list any new endangered species under the ESA. A group of environmental organizations brought suit challenging not the FWS's decision, but instead challenging the underlying executive order itself.

As articulated in this Article's proposed solutions, plaintiffs will still have to present some sort of injury, and that injury must be one that is particularized to them, rather than a generalized grievance common to all Americans.[418] The Supreme Court, however, has already contemplated the existence of such injuries: Plaintiffs in environmental cases can show injury by pointing to a particular aesthetic or educational interest in an area affected by the agency's action. Here, for example, the plaintiffs could point to their regular practices of photographing or simply watching the threatened species in their natural habitats.[419]

Next, the plaintiffs would have to allege that their injuries are fairly traceable to the executive order in order to meet the requisite causation element. Under the current standing framework, this would likely be difficult; even in one of the more successful cases, *Public Citizen*, the plaintiffs' standing remained in doubt based on the Government's arguments that the agencies had, in fact, not relied on the two-for-one rule order in making their deregulatory

416. *See* Siegel, *supra* note 11, at 1683.

417. *See* Lee & Ellis, *supra* note 342, at 227–28 (describing how the Case or Controversy requirement applies differently in procedural rights cases).

418. *See* Fed. Election Comm. v. Akins, 524 U.S. 11, 23–25 (1998) (finding that the plaintiffs demonstrated sufficient informational standing beyond an "abstract" or "generalized grievance" common to the public to challenge an FEC decision).

419. The plaintiffs pleaded a similar injury in *League I* and were found to have satisfied standing requirements. 303 F. Supp. 3d 985, 1001 (D. Alaska 2018).

decisions.[420] Conversely, under a more relaxed causation threshold, plaintiffs likely would be able to sufficiently show causation. If applying a presumption of causation, as suggested above, the court would easily be able to see this element satisfied absent significant evidence to the contrary.[421] Even without a presumption, a more relaxed approach, as in NEPA cases, would likely allow plaintiffs to proceed. They could point to the temporal proximity, the substance of the order as compared to the agency's decisions, or other factors that would help indicate causation.[422]

Finally, as for redressability, since the plaintiffs have already shown that their injury was caused by the executive order, they can likewise show that the court can redress their injury through ruling against the executive order. Of course, there is no guarantee that the agency would reach the correct outcome absent the executive order's corrupting influence. But substantive redressability not need be completely guaranteed in procedural rights cases.[423] Moreover, the Supreme Court has previously accepted that redressability can be met where the court's ruling would remediate the plaintiffs' injuries only to a degree; absolute reversal of the harm is not required.[424]

Taken all together, then, it seems that the plaintiffs in this Article's hypothetical likely succeed in showing they have met all the necessary standing requirements. Of course, the merits of the claim would remain undecided. A court might still be hesitant to invalidate an executive order. But courts can and do rule against executive orders that plainly violate statutes and exceed presidential authority;[425] this is not a case of enjoining the President or even criticizing his policies but a case of ensuring proper procedures are followed. In our hypothetical situation, that means ensuring that the FWS relies only on the best commercial and scientific data available, rather than an outcome-oriented executive order that directs the FWS to contravene the ESA.[426]

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420. Pub. Citizen Inc. v. Trump, 361 F. Supp. 3d 60, 85 (D.D.C. 2019).

421. Rebuttable presumptions are used in various areas of law; a presumption operates in favor of one party, but the other party may offer evidence sufficient to rebut it so as to avoid liability. *See, e.g.*, Rudisill v. Ford Motor Co., 709 F.3d 595, 608 (6th Cir. 2013) ("[O]nce the presumption has been invoked, a defendant may rebut it by marshaling evidence" sufficient enough to rebut the presumption).

422. *See, e.g.*, Mass. v. EPA, 549 U.S. 497, 523–25 (2007) (discussing how Massachusetts showed causation because the EPA's failure to regulate greenhouse gas emissions was linked to climate change-related harms).

423. *See* Lee & Ellis, *supra* note 342, at 172.

424. *See Mass.*, 549 U.S. at 526 (2007) (holding that the plaintiffs demonstrated redressability even where the United States' effort to reduce vehicle emissions would have only a very marginal impact on the effects of global warming).

425. *See, e.g.*, *League II*, 363 F. Supp. 3d 1013, 1030-31 (D. Alaska 2019) (invaliding part Exec. Order No. 13,795 as beyond the scope of the President's statutory authority under OCSLA).

426. 16 U.S.C.A. § 1533(b)(1)(A) (West 2018).

Moreover, by adjudicating this case, the court takes an important step toward preserving rule of law in the United States. Rather than allowing these anti-congressional executive orders to persist—and give rise to an appearance of corruption of agency processes by unlawful, result-oriented policy preferences rather than the data Congress requires—the court has the opportunity to strike down one such order. Even if not all of the problematic orders are invalidated, simply giving plaintiffs the opportunity to challenge these orders and require agencies justify their decisions on the public record is a critical part of complying with justification and transparency in lawmaking which are key rule of law principles.

Of course, this assumes that the President would obey the court's invalidation. There is no guarantee that the President would not decry the court's decision as outrageous, or at least seek to informally steer the agency in his desired direction. But there is never any guarantee of this. Indeed, scholars (and the Supreme Court) have long been wary of the Executive's power to ignore or evade judicial review and remedies.[427] This problem is not unique to the presidential administration context, and its possibility should not be allowed to control courts' in their ability to check presidential actions that go beyond the parameters of the Constitution or other law.

Public trust in government has consistently dwindled over the years, but that pattern need not continue. Although there are many, many issues to be addressed in order to continue safeguarding democratic norms and maintaining the rule of law, taking measures to challenge high-level violations of its principles is one important way to help fulfill these goals. Challenging executive orders that disregard and disrespect existing administrative laws is one such measure, and it is an especially important measure given that administrative agencies generate the majority of law regulating private conduct today. In this way, the application of relaxed standing requirements in challenges to presidential directives to agencies can be one possible way to keep our troubled system afloat.

V. CONCLUSION

Presidents have increasingly exercised influence over administrative agencies through formal directives. Although this type of presidential

427. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (Yale University Press, 2d ed. 1986) (advocating for the use of passive virtues and judicial restraint rather than getting courts too involved in the political arena); *see also* Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 GEO J. L. & PUB. POL'Y 1, 4–5 (2015) (describing how the Supreme Court has pragmatically avoided certain controversial decisions for fear of consequences from the political branches and the public).

administration has generally become accepted as a constitutional exercise of the executive authority, the limits of presidential administration remain murky.

This Article argues that such limits do exist: The President may not constitutionally order agencies to disregard valid laws ordering them to behave in certain ways and follow certain procedures. Executive orders that do this should and must be challenged—allowing these anti-law, anti-congressional orders to go unchallenged signals to the public that the President need not respect Congress or its laws, and that administrative agencies are subject to his whims rather than to the strictures of Congress or their own expertise. And these signals, made in the public forum, promote perceptions of government officials as corrupt, not bound by the rule of law, and as the source of irrational and unjustified regulations that fail to benefit the public.

This need not be so. Plaintiffs already seek to challenge these executive orders for what they are—unconstitutional exercises of authority that venture beyond the executive, well into legislative territory. All courts need to do is apply the same standards to these cases that they apply to other cases meant to check executive officials and agencies from acting beyond the bounds of law. Through utilizing this more relaxed version of standing, courts can advance their role as a critical safeguard against the erosion of constitutional norms and the rule of law. In doing so, courts do not exceed their own authority, but instead, fulfill their constitutional mandate to counter the unlawful ambitions of an increasingly powerful and otherwise unchecked Executive Branch.